

Recent US Sup Ct cases to have cites on -

Brown v. Socialist Workers Party, 51 USLW 4015
dec'd. Dec. 8, 1982. First Amendment election/political
right to assoc.

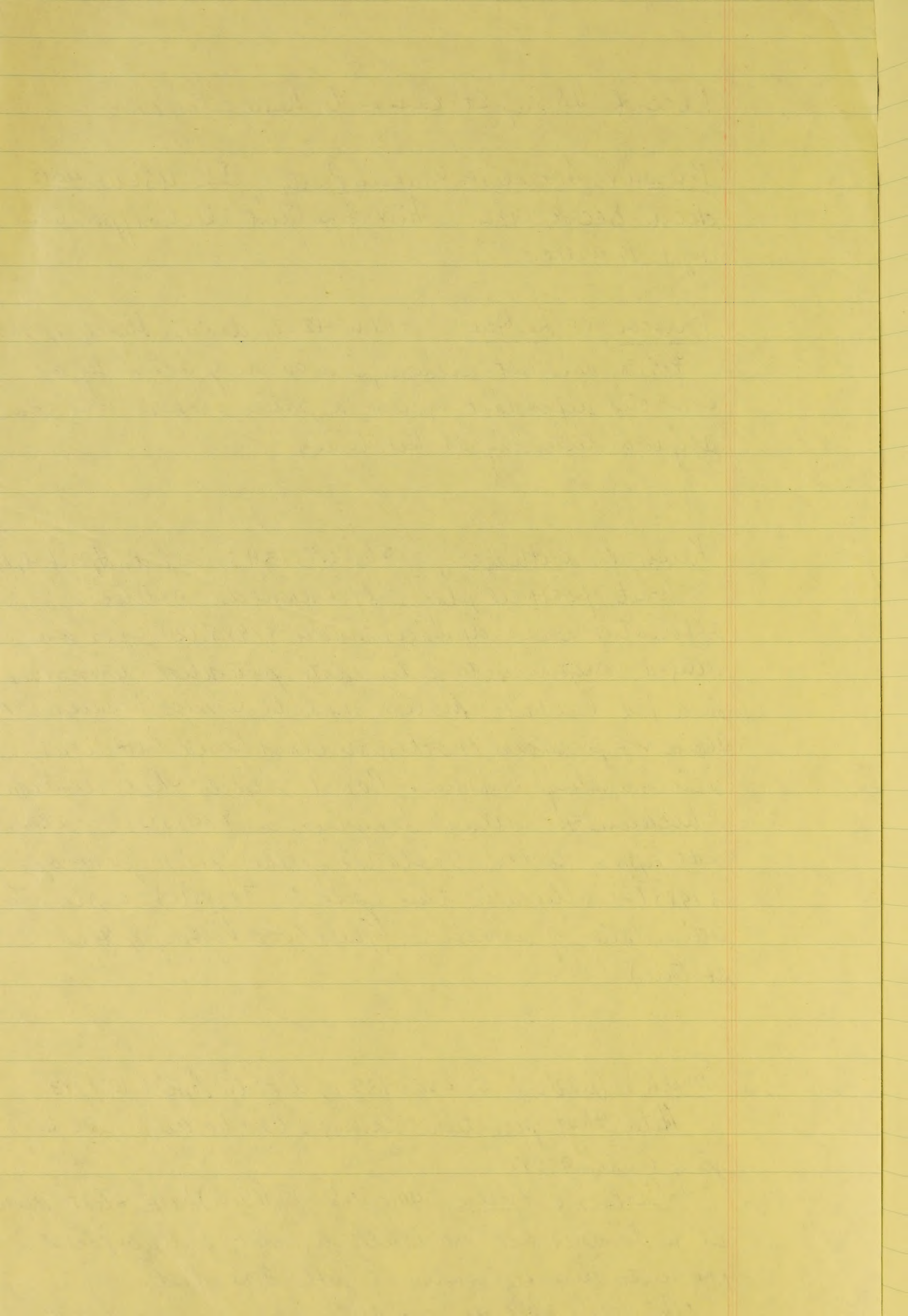
Briscoe v. LaHue, 51 LW 4237, dec'd. March 7, 1983
§1983 does not recognize a cause of action by a
convicted defendant against a police witness who gave
perjured testimony at his trial.

Krush v. Rutledge, 51 LW 4343, dec'd. April 4, 1983
White football player of unknown political
affiliation seeks damages under §1985(2) for an
alleged conspiracy to intimidate potential witnesses
in a fed. lawsuit. Motion made to dismiss because no
claim of racial or otherwise class based invidious
discriminatory animus. Court rejects the contention
"because the critical language in §1985(3) ... does
not apply to the violation of the first part of
§1985(2) alleged in this case." §1985(2) applies to
intimidation of witnesses. (Gives good history of the
statute.)

Smith v. Wade, 51 LW 4399, dec'd. April 10, 1983
Held that punitive damages can be awarded by a
jury under §1983.

Carlson v. Green, 446 U.S. 14 (1980) held that pun-
ative damages are available against fedl. officials
for suits directly under Eighth Amendment.

"As a general rule, we discern no reason why a
person whose federally guaranteed rights have been



Violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. Def. here argued that actual intent had to be proven to get punitive but Sup. Ct. says no.

[Read Slip Opinions through May 2, 1983]

Halkin II

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2214

ADELE HALKIN, ET AL., APPELLANTS

v.

RICHARD HELMS, DEPARTMENT OF STATE, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 75-01773)

Argued February 12, 1982

Decided September 21, 1982

Mark H. Lynch with whom *Charles S. Sims* was on the brief, for appellants.

Alfred Mollin, Attorney, Department of Justice with whom *Charles F. C. Ruff*, United States Attorney, at the time the brief was filed and *Leonard Schaitman*, Attorney, Department of Justice was on the brief, for Federal appellees. *Barbara Herwig*, Attorney, Department of Justice also entered an appearance for Federal appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Walter H. Fleischer with whom *James A. Bensfield*, *Alfred F. Belcuore* and *Daniel S. Goodman* were on the brief, for appellee, Ober.

John T. Boese and *Joyce A. Rechtschaffen* were on the brief, for appellee, Meyer, Jr.

Eugene L. Chrzanowski, *Richard W. Galiher*, *William H. Clarke*, *Frank J. Martell* and *William J. Donnelly* were on the brief, for appellee, Osborn.

Jon T. Brown and *Stephen E. Roady* were on the brief, for appellee, Angleton.

Stephen N. Shulman and *Charles R. Donnenfeld* were on the statement in lieu of brief for appellees, Helms, and Colby, et al.

Before: ROBINSON, *Chief Judge*; MACKINNON, *Circuit Judge* and NORTHROP,* *Senior Judge*, United States District Court for the District of Maryland

MACKINNON, *Circuit Judge*: Plaintiffs appeal several orders of the district court which resulted in the dismissal of their complaint for legal and equitable relief on claims arising out of certain activities of the Central Intelligence Agency (CIA) in the period from 1967 to 1974. The complaint alleged violations of plaintiffs' first, fourth, fifth and ninth amendments,¹ and of section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3).² For the reasons set forth below, the judgment of the district court is affirmed.

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

¹ Appellants confine their contentions on appeal to claims based upon the first and fourth amendments.

² The statute, which created the CIA under the aegis of the National Security Council, makes it the duty of the Agency to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemi-

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I. BACKGROUND

Appellants are 21 individuals and 5 organizations³ who in the late 1960's and early 1970's were involved in various activities seeking to protest and secure an end to the involvement of the United States in the Vietnam War. The individual appellees are seven named persons and an unspecified number of John Does who at the time plaintiffs' claims arose were officials of the CIA or were otherwise agents or employees of the United States government. The seven appellees referred to hereinafter as the "individual appellees"⁴ were sued for damages in their

nation of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions

. . .

50 U.S.C. § 403(d) (3) (1976) (emphasis in original).

³ Nina S. Adams, Leonard Palmer Adams, II, David F. Addlestone, Samuel W. Brown, Jr., Howard J. DeNike, Adele Halkin, Steve Halliwell, Carl Whitney Jacobson, Brennon Jones, Leigh Kagan, Richard Clark Kagan, Don Luce, Angus W. McDonald, Jr., Hugh I. Manke, Jonathan Mirsky, Sidney Peck, Joseph Remcho, Daniel Schechter, Ethel Taylor, George Williams Webber, Cora Weiss, American Friends Service Committee, Inc., Clergy and Laity Concerned, Committee of Concerned Asian Scholars, Women Strike for Peace, and Institute for Policy Studies. Nine individuals and two organizations who originally appeared as plaintiffs voluntarily dismissed their claims and are not parties to this appeal.

⁴ The individual appellees are Richard Helms (former Director of Central Intelligence), William E. Colby (same), James R. Schlesinger (same and also former Secretary of Defense), Cord Meyer, Jr. (Assistant Director for Plans of the CIA), James J. Angleton (Chief of CIA Counterintelligence Staff), Richard Ober (CIA Counterintelligence Staff), and Howard Osborn (Director of Security of the CIA). Nineteen individuals, three privately owned communications companies, and the heads of the National Security Agency and the Bureau of Narcotics and Dangerous Drugs (the latter in their official capacities) originally named as defendants were dismissed and no appeal is taken with respect to them.

individual capacities. The appellees also include the heads of the CIA, FBI, Department of Defense and Secret Service, who were sued in their official capacities and with respect to whom plaintiffs sought injunctive and declaratory relief only.

Plaintiffs⁵ filed suit in October 1975, after disclosures by the press and by the President's Commission on CIA Activities Within the United States⁶ (the Rockefeller Commission) revealed that government agencies, including the FBI and the CIA, had conducted intelligence operations that resulted in surveillance of United States citizens who opposed the war in Vietnam. These operations included intelligence gathering activities both within and without the United States. Two such intelligence gathering programs are the focus of the present litigation.⁷

A. *Operation CHAOS*

The first program, designated by the CIA as Operation CHAOS, was an intelligence-gathering activity conducted by the CIA originally at the request of President Johnson which sought to determine the extent to which foreign

⁵ "Plaintiffs" refers to all of the original plaintiffs and those added in the course of the proceedings in the district court, while "appellants" refers only to those plaintiffs who are before the court on the present appeal.

⁶ The Commission was established by Executive Order of President Ford on January 4, 1975, Exec. Order No. 11828 (1975) and filed its final Report in June 1975.

⁷ The accounts of these CIA programs, as they appear in the complaint, subsequent filings in the district court, and the briefs in this appeal, are drawn chiefly from the *Report to the President by the Commission on CIA Activities Within the United States* (1975) [hereinafter cited as "Rockefeller Report"] and Book III of the *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) [hereinafter cited as "Senate Report"].

governments or political organizations⁸ exerted influence on or provided support to domestic critics of the government's Vietnam policies.⁹ CHAOS was begun in 1967 by appellee Helms, who at the time was Director of Central Intelligence.¹⁰ Appellee Angleton, Chief of Counterintelligence for the CIA, selected appellee Ober to head what became known as the "Special Operations Group" of the CIA's Counterintelligence staff. The Special Operations Group was responsible for the conduct of Operation CHAOS.

Over the course of several years, Operation CHAOS produced six reports for the White House and some thirty-four reports for cabinet-level officials, dealing with the subject of foreign influence on the domestic antiwar movement. In the normal course of its operations, CHAOS also produced a steady stream of reports to the FBI and other agencies detailing the results of its various intelligence activities with respect to the antiwar movement.¹¹

⁸ Early CHAOS documents indicate the program's concern with the influence of "Soviets, Chicoms [Chinese Communists], Cubans and other Communist countries Of particular interest is any evidence of foreign direction, control, training or funding." Document Appendix (D.A.) at 13. See Senate Report, *supra* note 7, at 694.

⁹ According to early CHAOS documents, the domestic groups suspected of receiving such support included "radical students, anti-Vietnam war activists, draft resisters and deserters, black nationalists, anarchists, and assorted 'New Leftists.'" D.A. at 13.

¹⁰ Helms testified before the Rockefeller Commission that although the President never specifically directed the CIA to institute a program devoted to gathering this information, "the setting up of this unit [CHAOS] was what I conceived to be a proper action" to respond to "almost daily and weekly" requests of the President. Helms Testimony, *quoted in* Senate Report, *supra* note 7, at 689.

¹¹ Senate Report, *supra* note 7, at 696.

Discovery conducted by plaintiffs in the district court revealed that among the several thousand computerized files it maintained on Americans involved in various aspects of the antiwar movement,¹² Operation CHAOS ultimately developed files on 15 of the individual appellants and the five appellant organizations.¹³ The gravamen of plaintiffs' claims with respect to Operation CHAOS concerned the several known methods whereby the CIA compiled information on plaintiffs' activities.

First, CHAOS from the outset called upon CIA stations located abroad to report on the antiwar activities of U.S. citizens travelling in their areas. This reporting comprised both the routine provision of information thought by the local stations to be relevant to CHAOS requirements, and the gathering of particular intelligence at the specific request of the CHAOS office. Surveillance of Americans while abroad was conducted both through direct observation ("physical surveillance") and with the aid of electronic eavesdropping equipment.¹⁴ CIA agents abroad also requested the assistance of friendly local intelligence agencies, or "liaison services," in maintaining electronic and physical surveillance of American subjects. The use of local liaison services facilitated both the conduct of normal surveillance and "most important, [the] development of informants or . . . agent penetrations

¹² In addition to files containing information on the subject individual or group, the CIA's computer system indexed over 100,000 names of persons upon whom separate files were not maintained.

¹³ Because these files in some instances contained information about appellants not otherwise available to the public, the district court ordered these discovered CIA documents to be filed under seal.

¹⁴ D.A. at 317. The CIA has admitted that the conversations of two plaintiffs were overheard in the course of electronic surveillance conducted abroad; however, it refused to identify which two plaintiffs were involved. See note 28 *infra*.

within suspect groups" operating on foreign soil with whom Americans may have had contact.¹⁵

Second, beginning in late 1969, the CHAOS office developed its own network of informants for the purposes of infiltrating various foreign antiwar groups located in foreign countries that might have had ties to domestic antiwar activity. Although the principal focus of such infiltration was foreign groups, it is now known that informants destined for such assignments were directed to infiltrate antiwar circles within the United States for the purpose of gaining knowledge of their operations and credibility as antiwar activists. In the course of these preliminary associations, CHAOS agents apparently supplied information on the activities of domestic antiwar groups, and this information was placed in the general CHAOS data base.¹⁶

Third, Operation CHAOS made use of the facilities of other ongoing CIA surveillance programs. These included: (1) the CIA letter-opening program, which was directed at letters passing between the United States and the Soviet Union, and involved the examination of correspondence to and from individuals or organizations placed on a "watchlist;"¹⁷ (2) the Domestic Contact Service, a CIA office which solicits foreign intelligence information

¹⁵ D.A. at 21. With respect to the use of liaison services, the CIA refused to indicate whether any information concerning appellants was gained through such means.

¹⁶ See Senate Report, *supra* note 7, at 713-14. The CIA has admitted that CHAOS agents associated with at least one plaintiff within the United States and with an unspecified number of plaintiffs traveling in foreign countries; however, it refused to identify these plaintiffs. See note 28 *infra*.

¹⁷ In addition to the mail of persons who had been "watch-listed," the letter-opening program also examined randomly-selected letters moving between the United States and the Soviet Union. See generally Senate Report, *supra* note 7, at 559-624.

overtly from willing sources within the United States;¹⁸ (3) the CIA's "Project 2," which was directed at the infiltration of foreign intelligence targets by agents posing as dissident sympathizers and which, like CHAOS, had placed agents within domestic radical organizations for the purposes of training and establishment of dissident credentials;¹⁹ (4) the CIA's Project MERRIMAC, operated by the Office of Security, which was designed to infiltrate domestic antiwar and radical organizations thought to pose a threat to the security of CIA property and personnel;²⁰ and (5) Project RESISTANCE, also a creature of the Office of Security, which gathered information on domestic groups without any actual infiltration.²¹

From its inception, CHAOS also regularly received information from the FBI on that agency's investigations of the domestic antiwar movement.²²

B. *International Electronic Communications*

In addition to the surveillance activities carried out under the aegis of Operation CHAOS, plaintiffs complained of the CIA's practice of obtaining the contents of international communications (telephone, telegraph and radio transmissions) by submitting subjects' names on "watchlists" to the National Security Agency (NSA). NSA possesses the technology to scan the mass of signals transmitted through various communications systems and then to select out by computer those messages in which certain words or phrases occur. It is thereby possible for that agency to acquire all communications over a moni-

¹⁸ See *id.* at 701-03.

¹⁹ See *id.* at 704.

²⁰ See *id.* at 724-26.

²¹ See *id.* at 721-23, 728.

²² See, e.g., Joint Appendix (J.A.) at 434; Senate Report, *supra* note 7, at 694.

tored system in which, for example, a person's name is mentioned.²³ Between 1967 and 1973, the FBI, the Secret Service, and military intelligence agencies, as well as the CIA, submitted the names of domestic individuals and organizations on watchlists to NSA, and ultimately acquired through NSA the international communications of over a thousand American citizens.²⁴

On a prior appeal, *Halkin v. Helms (Halkin I)*, 598 F.2d 1 (D.C. Cir. 1978),²⁵ this court upheld a claim of the state secrets privilege by the Secretary of Defense and held that NSA was not required to disclose in discovery whether it had intercepted any of plaintiffs' communications. As a result of that ruling, plaintiffs' claims against the NSA and several individual officials connected with that agency's monitoring activities could not be proved, and the complaint as to those defendants was dismissed. Plaintiffs were left, however, with their claim that notwithstanding the practical bar to suit against NSA worked by the state secrets privilege, the CIA and the individuals responsible for submitting the watchlists to NSA could be held liable based on a presumption that the submission of a name resulted in interception of the named person's communications.

²³ Because this "vacuum cleaner" technology operates on the words or expressions contained in communications, without reference to the identity of the speaker or receiving party, it is impossible to predict whether the presence of a name on a watchlist will result in the interception of communications to or from that person, or only of communications in which the name is mentioned. See *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 11 & n.8 (D.C. Cir. 1978).

²⁴ Brief for Appellants at 36. The CIA apparently submitted 30 names in the course of its use of NSA for these purposes.

²⁵ A related case in this court, *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), was an action seeking a writ of mandamus to vacate a trial court order prohibiting out-of-court statements by the parties on information produced in the course of discovery.

C. *History of the litigation*

1. *Discovery*

Since this action was filed in October 1976, the parties have fought the bulk of their dispute on the battlefield of discovery. Shortly after filing their complaint, plaintiffs sought the production of documents concerning (1) the conduct of Operation CHAOS in general, and (2) CHAOS surveillance of plaintiff individuals and organizations in particular. A large number of documents responsive to plaintiffs' request were produced, but with portions claimed to disclose sensitive information redacted.²⁶ Approximately 200 responsive documents were withheld in

²⁶ Where they occurred, the redactions were labeled by letter and number according to the following code:

1—Words or text denoting or revealing CIA field stations, bases or components.

2—Cryptonym, sensitivity indicator or information-handling indicator.

3—Words or text identifying a CIA employee or organizational component.

4—Security classification of the document.

A—Information obtained from or about the investigative or intelligence activities of another United States Government agency.

B—Words or text identifying an intelligence security service of a foreign government in liaison with CIA, or information obtained from such liaison relationship with CIA.

C—Irrelevant information or words identifying a non-party whose privacy interests are entitled to protection from disclosure.

D—Words or text identifying or aiding the identification of CIA foreign intelligence or counterintelligence sources or methods.

An examination of the redacted documents confirms that the redacted portions are indeed identification words, codes, or figures. Such confirmation, of course, says nothing about the *justifiability* of the redactions in a discovery context.

their entirety.²⁷ Subsequently, as public reports further disclosed the extent of CIA domestic activities, plaintiffs in July 1977 sought additional discovery in the form of (3) requests for admissions that the CIA or foreign "liaison services" had conducted various types of surveillance against each plaintiff or against nonparty organizations to which plaintiffs belonged; (4) further interrogatories seeking more detailed justification of the redaction and withholding of documents previously requested; (5) a request for the production of documents concerning the conduct of operations MERRIMACK and RESISTANCE and any documents generated by those operations which concerned the plaintiffs; and (6) CHAOS documents concerning several plaintiffs who had moved to intervene in the litigation (and whose intervention was ultimately permitted).

The CIA declined to supply all of the information requested by plaintiffs. With respect to the identification of plaintiffs who had been the subjects of surveillance under the CHAOS program or by virtue of watchlists submitted by the CIA to NSA, the CIA claimed that more than the limited disclosure already given²⁸ would reveal the iden-

²⁷ The CIA furnished brief descriptions of documents that were entirely withheld (*e.g.*, "Dispatch dated 1 August 1968, information in dissident activity abroad, mentions [plaintiff] in passing").

²⁸ The CIA had admitted in the course of discovery that various identified and unidentified plaintiffs were on several occasions the targets of CHAOS surveillance or were subjected to surveillance in the course of CHAOS operations directed at other subjects. Specifically, it appears that under Operation CHAOS, the CIA (1) opened and copied the mail of three identified plaintiffs within the United States (J.A. 431-32); (2) targeted the mail of at least two identified plaintiffs for opening (D.A. 34-41); (3) had CHAOS agents attend private meetings of unidentified plaintiff organizations (D.A. 253-281); (4) collected nonpublic information on nine other identified plaintiffs (J.A. 760 & sealed exhibits); (5) electronically surveilled two unidentified plain-

tities of covert sources and disclose the existence of liaison relationships with foreign intelligence services, and that therefore this information was privileged from discovery. The CIA declined on grounds of relevance to answer the interrogatories concerning surveillance of nonparty organizations to which plaintiffs belonged. It declined to answer plaintiffs' interrogatories seeking more detailed explanations of the redactions in the documents it had produced, continuing to assert the adequacy of its number-and-letter coded explanations as to both the documents earlier produced and newly produced documents. Finally, it refused to disclose whether any plaintiffs' names had been submitted on watchlists to NSA by the Special Operations Group.

In January 1978, plaintiffs pursuant to Fed. R. Civ. P. 37 filed a motion to compel the Director of the CIA to respond to plaintiffs' interrogatories and requests for production of documents.²⁹ The CIA responded with two affidavits by then-Director Stansfield Turner formally claiming that the requested information was protected from discovery by the state secrets privilege.³⁰ The first affidavit was for the public record, and stated essentially

tiffs abroad in the course of operations directed at other persons (J.A. 426); (6) had two agents who "were associated" with at least one unidentified plaintiff within the United States (J.A. 434); and (7) had agents who "associated" with an undisclosed number of unidentified plaintiffs abroad, in the course of operations directed at other persons (J.A. 434).

²⁹ J.A. at 521.

³⁰ The Turner affidavits also invoked a "statutory privilege arising from section 102(d)(3) of the National Security Act of 1947." J.A. at 542-43. That section, codified at 50 U.S.C. § 403(d)(3) (1976), provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The merits of this asserted privilege were not discussed by the district court and are not at issue on appeal.

that the identities of liaison services and casual and CIA-paid informers who had provided information to the CHAOS program would likely be revealed if further identification of particular instances in which plaintiffs had been subjected to surveillance was provided, and that such revelations of secrets of state would damage the national security.³¹ The second affidavit, classified "SECRET" by the agency, was submitted to the court *in camera*. It made the same claim of privilege, but "in somewhat greater detail."³²

In a memorandum opinion filed August 30, 1978, the district court upheld the CIA's claim of the state secrets privilege and denied plaintiffs' motion to compel.³³ Placing heavy reliance upon the *in camera* affidavit of Director Turner, the court ruled that the claim of privilege met the procedural requirement set forth in *United States v. Reynolds*, 345 U.S. 1 (1953), and had "overwhelming support" on its merits. The court specifically accepted the CIA's assertion of the privilege against plaintiffs' demand

³¹ J.A. at 539.

³² Turner Public Aff., ¶ 5 (J.A. at 543). The *in camera* affidavit has been inspected by this court.

³³ J.A. at 590. The claim of the state secrets privilege did not extend to the interrogatories concerning surveillance of organizations to which plaintiffs belonged (to which the agency had objected on grounds of relevance) or to the production of documents concerning the MERRIMACK or RESISTANCE projects. However, the court refused to compel discovery as to these matters as well. With respect to the organizations of which some plaintiffs were members but which were not themselves plaintiffs—some 25 in number, according to the plaintiffs—the court held that discovery would work an undue burden if permitted to extend beyond the immediate plaintiffs, which included at that time the organizations appearing as appellants here. The court declined to order discovery on the MERRIMACK and RESISTANCE projects on the ground that disclosures made to that point, coupled with information available under FOIA, would provide all the information plaintiffs required. J.A. at 593-94.

for further explanation of redactions made in released documents.³⁴

In February 1979, plaintiffs filed a further motion to compel discovery. This motion concerned the CIA's refusal to provide, in response to plaintiffs' original Rule 34 request for production, documents relating to Operation CHAOS that had been prepared for and used in the testimony of CIA officials before the Senate and House Intelligence Committees. Defendants opposed this motion with letters from the Chairman and Vice-Chairman of the Senate Select Committee on Intelligence and the Clerk of the House (who is charged with the custody of House records), voicing the objection of those officers to disclosure of the testimony or background materials.³⁵ The district court, crediting the objections, denied plaintiffs' motions without opinion.³⁶ A subsequent motion urging that notwithstanding the congressional officers' objections, the documents were not privileged under the Speech or Debate Clause, U.S. Const. Art. I, § 6, was likewise denied.³⁷

In the course of their efforts to obtain discovery from the CIA, plaintiffs also subpoenaed certain records of the President's Commission on CIA Activities Within the United States (the "Rockefeller Commission"), which were in the possession of the Archivist of the United

³⁴ Plaintiffs' motion for reconsideration in light of the adoption of a new Executive Order, E.O. 12065, 3 C.F.R. 190 (1979), which superseded the prior Executive Order governing the classification of information concerning the national security, was denied. Pending decision of this appeal, E.O. 12065 was itself superseded by E.O. 12356 (1982). See note 65 *infra*.

³⁵ The documents sought, which included verbatim transcripts of the testimony itself, J.A. at 629, were in the physical possession of the CIA.

³⁶ J.A. at 654.

³⁷ J.A. at 685.

States.³⁸ The Archivist made a significant portion of Commission materials available in the summer of 1979, but with redactions made at the behest of the CIA.³⁹ Plaintiffs filed a motion to compel the Archivist to comply fully with the subpoena. This motion was denied in May 1980 without opinion, presumably on the strength of an affidavit of an Assistant General Counsel of the CIA to the effect that the redactions by the Archivist corresponded to those made by the CIA of its CHAOS documents pursuant to the state secrets privilege which the district court had previously upheld.⁴⁰

In addition to the foregoing attempts to conduct discovery through interrogatories and document production requests, plaintiffs sought to take the oral depositions of several past or present CIA officials named as defendants. In response, the CIA officials moved under Fed. R. Civ. P. 26(c) for a protective order limiting the depositions.⁴¹ Most prominently, the defendants urged that they be deposed only upon written interrogatories as provided for in Fed. R. Civ. P. 31. This procedure, it was argued, would permit the defendants to review their answers to questions so as to insure that no privileged information was divulged.

The court rejected defendants' proposed protective order, but entered an order requiring plaintiffs to serve their initial questions upon the deponents in writing and far enough in advance to permit the CIA to evaluate the need to assert the state secrets privilege with respect to matters inquired into. Questions objected to on national security grounds were not permitted to be asked at the

³⁸ J.A. at 595.

³⁹ See J.A. at 688. The redactions of the Rockefeller Commission documents were not explained by number-and-letter code.

⁴⁰ J.A. at 758-59.

⁴¹ J.A. at 598.

oral depositions, and oral follow-up questions to the written questions were also confined to matters not objected to on national security grounds. Plaintiffs subsequently propounded written questions to be asked of several defendants, and defendants objected in part. The district court, because of its disposition of plaintiffs' claims, never found it necessary to rule on the objections, and the depositions were never taken.

2. *Disposition of plaintiffs' claims*

(a) *Individual defendants*

Seven of the present appellees are individuals who are or were officials of the CIA or the Department of Defense. These individuals were sued for damages based on asserted violations of plaintiffs' rights under the Constitution, on the well-established theory that certain provisions of the Constitution provide direct actions for damages arising from their violation.⁴² The claims against these defendants were disposed of in two phases.

Defendants Howard Osborn and James J. Angleton were, respectively, the CIA's Director of Security and Chief of Counterintelligence Staff at the time plaintiffs' claims arose. They moved in May 1978 to dismiss the complaint against them for lack of jurisdiction over their persons, on the theory that because they lived and worked

⁴² The availability of such a remedy was first announced in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which it was held that a damage action lay against federal law enforcement agents for acts that violated the plaintiff's fourth amendment rights. The courts have subsequently implied damage remedies against federal officials under other constitutional guarantees. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (eighth amendment proscription of cruel and unusual punishment); *Davis v. Passman*, 442 U.S. 228 (1979) (fifth amendment due process clause guarantee of equal protection of the laws); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (first amendment freedoms of speech and association).

in Virginia (where CIA headquarters is located), they lacked sufficient contacts with the District of Columbia to give the court power over them. After directing plaintiffs to adduce evidence showing both venue under 28 U.S.C. § 1391(b) and personal jurisdiction under the District of Columbia long-arm statute, D.C. Code § 13-423, the court found the proffered evidence of contacts with the District insufficient and dismissed the complaint as to Osborn and Angleton in August 1978 for lack of jurisdiction.

Former CIA Directors William Colby and Richard Helms, former Secretary of Defense James R. Schlesinger (also a former CIA director), Richard Ober (head of the CHAOS program) and Cord Meyer, Jr. (Assistant Deputy Director for Plans of the CIA), remained parties. With the district court's ruling upholding the CIA's claim of the state secrets privilege, however, it became clear that plaintiffs would be unable to adduce evidence to prove any of the details of their claims based on (1) physical and electronic surveillance by the CIA; (2) surveillance conducted by foreign intelligence (liaison) services; or (3) infiltration of plaintiff organizations or other groups to which plaintiffs belonged. Without access to documents identifying either the subjects of CHAOS surveillance or the types of surveillance used against particular plaintiffs, the likelihood of establishing injury in fact, causation by the defendants, violations of substantive constitutional provisions, or the quantum of damages was clearly minimal.

Based on the plaintiffs' evident inability to prove their claims, the five individual defendants moved for summary judgment on the claims except those involving letter-opening.⁴³ The court, with plaintiffs' concession that they

⁴³ In the face of this motion, the parties agreed to dismiss the letter-opening claims against the individual defendants with prejudice in return for defendants' bearing \$7,000 in costs. See J.A. 778.

could not prove a set of facts entitling them to relief,⁴⁴ subsequently granted summary judgment in favor of the individual defendants.

(b) *Defendants sued in their official capacities*

The heads of the CIA, FBI, Department of Defense and Secret Service were sued in their official capacities for injunctive and declaratory relief. The plaintiffs sought thereby to prevent the government from any future surveillance of the sort alleged to have taken place in the course of Operation CHAOS.

In June 1979, the agency heads filed a motion under Fed. R. Civ. P. 56(b) and 12(b)(6) for summary judgment, or in the alternative for failure to state a claim upon which relief could be granted, on all of plaintiffs' claims for injunctive and declaratory relief.⁴⁵ The grounds for this motion were that: (1) Operation CHAOS had been terminated in 1974; (2) the United States' involvement in the Vietnam War, resistance to which had been the subject of CHAOS and related intelligence activities, had ended in 1973; (3) the CIA had not collected any information on plaintiffs since 1974; and (4) the promulgation in 1978 (in response to the Rockefeller Commission report) of Executive Order 12036, 3 C.F.R. 112 (1979), governing the gathering of intelligence about U.S. citizens, and the adoption of informal CIA directives implementing that Order, had eliminated any likelihood of future surveillance of the types that plaintiffs alleged had violated their rights.

Plaintiffs opposed the government's motion, claiming that the newly-signed Executive Order in fact continued

⁴⁴ J.A. at 776.

⁴⁵ J.A. at 668. Excluded from this motion were claims growing out of the CIA's maintenance and dissemination of files relating to plaintiffs. These claims were ultimately dismissed by stipulation in August 1980 upon the government's agreement to pay \$7,000 of plaintiffs' costs. J.A. at 781.

to render them subject to surveillance by the various intelligence agencies, and that in any event, they were entitled to an injunction prohibiting future unconstitutional surveillance and a declaration that Operation CHAOS violated their rights.

The court granted the motion of the agency heads on June 5, 1980. With respect to the claims based on the submission by the CIA of watchlists to NSA, the court noted that our decision in *Halkin I* upholding the NSA's state secrets privilege had prevented discovery of information that would disclose whether NSA had in fact intercepted plaintiffs' communications, and had also rejected the claim that the inclusion of plaintiffs' names on a NSA watchlist required the presumptive inference that their communications had been intercepted.⁴⁶ The district court ruled that, as a result of being unable to demonstrate the actual interception of their communications, plaintiffs would be unable to prove any liability on the part of the CIA and its officials, and hence could not make out a case for injunctive or declaratory relief against the agency. The watchlisting claims were consequently dismissed.

With respect to the claims based on Operation CHAOS, the district court rejected plaintiffs' contention that there existed a likelihood of their being subjected to CIA surveillance in the future. "The Court believes that this is hypothetical or speculative harm which is insufficient to support the grant of declaratory or injunctive relief."⁴⁷

⁴⁶ See *Halkin I*, 598 F.2d at 10-11. Noting that the state secrets privilege was being claimed by the United States, and not by or on behalf of the defendants, we held that "[n]ot only would such a presumption [of interception] be unfair to the individual defendants who would have no way to rebut it, but it cannot be said that the conclusion reasonably follows from its premise." *Id.* at 11.

⁴⁷ J.A. at 767, citing *Laird v. Tatum*, 408 U.S. 1, 14 (1972) and *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

It therefore entered summary judgment in favor of defendants on all claims for injunctive and declaratory relief.

(c) *Dismissal of four plaintiffs for failure to make discovery*

All plaintiffs were served with some 240 interrogatories by the defendants in late 1976.⁴⁸ These interrogatories sought, *inter alia*, information about plaintiffs' political activities, the factual bases of the allegations contained in the complaint, the injuries sustained by plaintiffs, and the damages sought. After several stipulated time extensions, plaintiffs objected to the vast majority of the interrogatories.⁴⁹ Two of the organizational plaintiffs ultimately dismissed filed timely answers to those relatively few interrogatories to which they did not object. The defendants then filed a motion to compel.

In July 1977, the court entered an order ruling on plaintiffs' objections and incorporating certain agreements as to the interrogatories that the parties had reached at the urging of the court. The court rejected plaintiffs' ob-

⁴⁸ At that time, the defendants present here as appellees were all represented by the Justice Department. In October 1977, various private counsel undertook the representation of the individual appellees except for appellee Schlesinger.

⁴⁹ Many of plaintiffs' objections were that the personal information sought about their political, social, financial and travel situations or habits was irrelevant to any claim or defense, or sought information already in the public record (*i.e.*, in the congressional committee and presidential commission reports on CIA activities) or in defendants' possession. Such information would therefore in plaintiffs' view have been unduly burdensome to compile. The bulk of the remaining objections was based on the claim that answers to questions about plaintiffs' legal theories and the specific facts giving rise to their claims could properly be made only after plaintiffs completed their own discovery. In other instances, chiefly those in which the question sought information about the conduct of the litigation itself, the objections also relied on claims of privilege.

jections based on the presence of information in public reports and many of the objections to relevance. It deferred plaintiffs' obligation to answer questions relating to damages, plaintiffs' legal theories, and "areas covered by the attorney-client privilege" until plaintiffs had made further discovery. Plaintiffs were given 14 days in which to answer the remaining interrogatories "or the claims asserted by such plaintiffs shall be dismissed with prejudice."⁵⁰

Plaintiffs failed to comply with that deadline, and were granted an extension of time to August 18, 1977. The order extending the time for filing stated that upon failure to file timely answers, "this court will entertain briefs on the issue of what sanctions, if any, should be imposed . . ."⁵¹ Appellants Cora Weiss, American Friends Service Committee, Clergy and Laity Concerned, and Institute for Policy Studies failed to file their answers by August 18; a motion for further extension was denied. After a hearing, the court on May 24, 1978 granted CIA's motion to dismiss the noncomplying plaintiffs. Plaintiffs' motion in the interim for discovery sanctions against defendants based on similar lapses was denied.

II. ISSUES ON APPEAL

With judgment or a final order entered on all of plaintiffs' claims, this appeal was filed. The errors urged by appellants fall essentially into three categories: (1) those concerning the merits of and the consequences flowing from the district court's upholding of the government's claim of state secrets privilege (including the restrictions on discovery necessitated by that ruling); (2) those concerning other restrictions of the plaintiffs' discovery (the congressional materials, the submission of deposition

⁵⁰ J.A. at 338-39.

⁵¹ J.A. at 377.

questions in advance, and the sustaining of the CIA's objections to the relevance of plaintiffs' interrogatories); and (3) those concerning the availability of declaratory and injunctive relief for the constitutional violations plaintiffs alleged. Were the appellants to prevail on aspects of these assigned errors to the extent that appellees' liability might be made susceptible of proof, the court would additionally face the questions raised by the district court's dismissal of four of the plaintiffs as a discovery sanction and its dismissal of appellees Osborn and Angleton for want of personal jurisdiction.

III. DISCUSSION

A. *The State Secrets Privilege*

Plaintiffs explicitly conceded in the district court that the successful invocation of the state secrets privilege by the Director of Central Intelligence made it impossible for them to go forward with their claims for *damages* based on statutory and constitutional violations occurring as a result of Operation CHAOS. Without access to the facts about the identities of particular plaintiffs who were subjected to CIA surveillance (or to NSA interception at the instance of the CIA), direct injury in fact to any of the plaintiffs would not have been susceptible of proof.⁵²

Because the state secrets privilege, like other evidentiary privileges, operates to foreclose relief for violations of rights that may well have occurred by foreclosing the discovery of evidence that they did occur, it is a privilege "not to be lightly invoked." *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Its invocation must be carefully

⁵² As was noted in *Zweibon v. Mitchell*, 516 F.2d 594, 611 (D.C. Cir. 1975) (en banc) (plurality opinion of Wright, J.), damages for fourth amendment violations under *Bivens* are "recoverable [only] upon proof that injuries resulted from the violation."

considered to assure that the proper balance is struck between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding of the national security. We turn to that consideration.

1. *General principles*

The starting point for any analysis of a claim of the state secrets privilege is *United States v. Reynolds*, 345 U.S. 1 (1953). That case establishes that secrets of state—matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation⁵³—are *absolutely privileged* from disclosure in the courts. Although the courts in evaluating claims of the privilege may take cognizance of the need for the information demonstrated by the party seeking disclosure, such need is a factor only in determining the extent of the court's inquiry into the appropriateness of the claim.⁵⁴ Once the court is satisfied that the information poses a reasonable danger to secrets of state, "even the most compelling necessity cannot overcome the claim of privilege" *Id.* at 11.

⁵³ 345 U.S. at 10. *Reynolds* itself involved a military secret. However, the privilege extends to matters affecting diplomatic relations between nations. See, e.g., *Attorney General v. The Irish People, Inc.*, No. 81-1035 (D.C. Cir. July 2, 1982); *Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956). See generally Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?* 91 Yale L.J. 570, 576-77 (1982).

⁵⁴ Where the need can be substantially met through less intrusive means, the court's scrutiny of the basis for the claim of privilege need not be as searching as it would be where the privileged evidence is the only means of proving a claim or defense. In *Reynolds*, for example, the Court ruled that submission of the desired documents—Air Force accident reports—for *in camera* review was inappropriate in view of the fact that live witnesses and investigator, were available to testify on the accident.

Therefore, the critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in the litigation. That balance has already been struck. Rather, the determination is whether the *showing* of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.

A second inquiry may be posed once the government—whether as a party to the litigation or simply as the person having legal control over the information involved—has successfully invoked the privilege. The question then becomes whether the case is to proceed as if the privileged matter had simply never existed, with the parties bearing the consequent disadvantages (or advantages) of this sudden disappearance, or instead should proceed under rules that have been changed to accommodate the loss of the otherwise relevant evidence. Such changes could compensate the party “deprived” of his evidence by, for example, altering the burden of persuasion upon particular issues, or by supplying otherwise lost proofs through the device of presumptions or presumptive inferences. In *Halkin I*, we declined the invitation to engage in such an alteration of the parties’ burdens. *See* 598 F.2d at 11. Insofar as that ruling represents the law of the case, we must likewise decline to do so here. *See generally Salisbury v. United States*, No. 81-1657 (D.C. Cir. —, 1982).

2. *Privilege questions raised by the present appeal*

Turning to the facts of the present case, we find the state secrets privilege involved in two of the errors urged by appellants. The first concerns the district court’s refusal to compel the defendants to answer interrogatories and produce documents relating to the conduct of Operation CHAOS. The second concerns the court’s dismissal of plaintiffs’ claims for relief based on the CIA’s admitted submission of “watchlists” to NSA, on the ground

that any interception of plaintiffs' communications was privileged.

As reviewed above, the government refused to respond to interrogatories or produce documents disclosing either the identities of plaintiffs who were subjected to CHAOS surveillance or the means of such surveillance. The claim of privilege was asserted in both the public and classified *in camera* affidavits of Stansfield Turner submitted in his capacity as Director of Central Intelligence. Appellants urge that the claim of privilege was defective in several respects and that the district court's denial of their motion to compel discovery was therefore an abuse of discretion.

As the government argues, appellants' "only objections to the district court's upholding of the privilege are procedural." Since that ruling resulted in maintaining the secrecy of the information sought, it is scarcely surprising that appellants have not chosen to contest the sensitivity of the information on its merits. Even had they the means and the desire to do so, our task would be no different, for the standard set down in *Reynolds* is itself purely a procedural framework for testing claims of privilege.

Reynolds set forth three threshold requirements for claims of the state secrets privilege: that there be "a *formal* claim of privilege, lodged by the *head of the department* which has control over the matter, after *actual personal consideration* by that officer." 345 U.S. at 7-8 (emphasis added; footnotes omitted). It is undisputed that these requisites are met here. Beyond this, "the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result.'" *Id.* at 9, quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (discussing privilege against self-incrimination).

We hold that the district court acted well within its discretion in finding the Director's affidavits adequate to establish the reasonable danger of injury. We think that the additional showings appellants would require by analogy to claims of exemption under the Freedom of Information Act ⁵⁵ are both unnecessary and unwise.

Appellants' attack on the showing made by the CIA to justify the privilege with respect to CHAOS information is three-fold. First, appellants argue that the Director's *public* affidavit was too vague to establish the privilege. Second, they contend that the court's reliance upon the Director's *in camera* affidavit improperly deprived them of an opportunity to litigate the privilege question. Third, with particular regard to the refusal to produce (and the redaction of) CHAOS documents, appellants argue that the government should have been compelled to supply a more detailed explanation of *each* withholding and redaction than the letter-and-number code provided. These contentions are considered in order.

1. The value of rules for determining the adequacy of the sort of affidavits involved here varies inversely with the breadth of such rules. As the court in *Reynolds* recognized, it is the circumstances in which a demand for information is made and the "implications of the [demand] in the setting in which it is asked," 345 U.S. at 9, that will provide the commonsense guide to resolving the adequacy question. We think that the Director's public affidavit, read against the background of the widespread public disclosures about the conduct of Operation CHAOS on the one hand and the undeniable sensitivity of our diplomatic relations on the other, alone suffices to satisfy the requirements of the privilege.

It is evident from the descriptions of the CHAOS program found in the Rockefeller Commission and Senate reports that the CIA's conduct of Operation CHAOS ex-

⁵⁵ 5 U.S.C. § 552 (1976).

tended to the surveillance of foreign citizens both here and abroad. It relied upon the cooperation of foreign intelligence services, and upon the information supplied by CIA agents who were undercover both here and abroad. The Director's public affidavit, while necessarily unspecific, set forth the grounds requiring secrecy in this context.⁵⁶

⁵⁶ The affidavit stated in part:

9. As a step in analyzing whether or not such foreign influence in fact existed, information regarding the international travels and contacts of identifiable protest leaders was collected. Much of this information could only be collected through, or with cooperation of, foreign governments in a position to monitor such travel. Consequently, in significant part the information recoverable from the files of the CHAOS project is information either supplied by foreign governmental liaison sources or otherwise witnessing their cooperation. While in a general sense it may be acknowledged that CIA derives information through liaison arrangements with foreign governments, the fact of CIA interaction with authorities of a particular foreign government may not be acknowledged without damaging U.S. diplomatic or intelligence relationships with that government. Secrecy is the *sine qua non* of liaison arrangements and breach of the understanding of confidentiality will predictably lead to a diplomatic incident, or restriction and disruption of cooperative intelligence relationships, or both. Consideration of the confidential nature of the relationship requires that both liaison-derived information and the location of CIA stations abroad be protected from disclosure.

10. The collection of information of a type from which an informed judgment could be made regarding foreign influence was also undertaken through the solicitation of information from persons in contact with protest leaders, both casual informants and individuals paid by CIA to collect such information. The identities of these individuals must be protected. In many cases the nature of the information reported is enough to single out who it is that acted as the CIA source. If CIA cannot deliver on its pledge of confidentiality in soliciting

It is self-evident that the disclosures sought here pose a "reasonable danger" to the diplomatic and military interests of the United States. Revelation of particular instances in which foreign governments assisted the CIA⁵⁷ in conducting surveillance of dissidents could

information from otherwise reluctant sources, such sources will simply be unavailable in the future. In the case of persons acting in the employ of CIA, once their identity is discerned further damage will likely result from the exposure of other intelligence collection efforts for which they were used.

11. In response to interrogatories presented by the plaintiffs, it has been acknowledged that conversations of two of the plaintiffs were overheard as a result of electronic surveillance operations conducted outside the United States by agents of the Central Intelligence Agency, although the plaintiffs were not the actual targets of the electronic surveillance. Mail sent to or addressed by three plaintiffs and intercepted by CIA has been released to them. It has been further acknowledged that agents of the Central Intelligence Agency associated with plaintiffs with a result that information was provided to the Special Operations Group, although the ultimate goal of such association was to gain access to foreign intelligence targets. The disclosure of additional information regarding the instances of electronic surveillance or agent reporting, particularly the requested dates of such occurrences and the respective plaintiffs involved, cannot be disclosed without permitting the plaintiffs to divine the particulars of such surveillance or the identities of those who acted as informants.

J.A. at 541-42.

⁵⁷ Appellants argue that they have never sought the identities of any CIA operatives or liaison services, but only the identities of the *plaintiffs* who were subjected to surveillance. However, it is clear that armed with this information and the mass of facts to be culled from the public record of CHAOS activities, it might well be possible for appellants and others to deduce such identities based upon their personal knowledge of their own contacts, activities and whereabouts. We have said that intelligence gathering is "akin to the construction of a mosaic [in which] [t]housands of

strain diplomatic relations in a number of ways—by generally embarrassing foreign governments who may wish to avoid or may even explicitly disavow allegations of CIA or United States involvements, or by rendering foreign governments or their officials subject to political or legal action by those among their own citizens who may have been subjected to surveillance in the course of dissident activity.⁵⁸

Similarly, the identities of CIA operatives who contributed information to CHAOS (both those hired by CHAOS itself and those attached to other departments within the agency) are self-evidently the sort of information which if disclosed could harm national security or diplomatic interests. Without considering the risk to the individuals involved,⁵⁹ it is obvious that the exposure

bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.” *Halkin I*, 598 F.2d at 8. This is no less true of attempts to penetrate the practice of intelligence-gathering itself. In *Halkin I*, we barred discovery of the identity of plaintiffs whose communications had been intercepted by NSA, noting that “the identity of particular individuals whose communications have been acquired can be useful information to a sophisticated intelligence analyst.” *Id.* at 9. Surely that is no less true in the case of the surveillance conducted by CHAOS agents than it is of the eavesdropping performed by NSA computers.

⁵⁸ It bears noting in this connection that few if any national governments besides our own are inclined to establish official commissions of inquiry into the activities of their intelligence agencies, or to make public the results of such inquiries. The fact that our government has chosen to make a relatively clean breast of its foreign and domestic intelligence activities’ impact on individuals hardly supports an inference that other governments are anxious to have their roles in those activities similarly submitted to the scrutiny either of their citizens or of foreign interests.

⁵⁹ Appellants suggest that the Director’s claim of privilege as to the identities or identifying characteristics of informers is properly viewed as an instance of the “informer’s privi-

of one who acted—and indeed may still be acting—as a CIA operative here and abroad ⁶⁰ would pose a threat to our diplomatic and military interests. See *Military Audit Project v. Casey*, 656 F.2d 724, 749 (D.C. Cir. 1981). Information that permitted one of the appellants to determine that he, she, or it had been the subject of surveillance might also be sufficient, when combined with knowledge of the individual's other activities, to identify CIA operatives as having participated in activities abroad that were heretofore assumed free of such involvement, or as having had access to information previously assumed to have been secure.⁶¹

Appellants argue that some of the matters apparently claimed to be privileged are in fact matters of public knowledge, and therefore that the privilege claim must be assumed to be overbroad and suspect. They point to the “extensive body of literature revealing such information in books by former CIA officials which have been screened

lege,” see *United States v. Roviato*, 353 U.S. 53 (1957), rather than of the state secrets privilege, and so is only a claim of *qualified* privilege. For the reasons stated in text, we dismiss this contention. The fact that the informer's privilege might be applicable *in addition* to that for state secrets is irrelevant to the consideration of the latter privilege.

⁶⁰ As discussed in Part I, *supra*, CHAOS agents and other informants frequently posed as members of domestic anti-war groups prior to taking up posts overseas.

⁶¹ See *Turner Affidavit*, ¶ 11, *quoted in* note 56 *supra*. Our quotation of the Fourth Circuit's characterization of the problem in *Halkin I*, 598 F.2d at 8-9, bears repetition:

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

and approved by the CIA prior to publication.”⁶² This published matter offers little support for the contention. In *Halkin I*, we held that “[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not.”⁶³ We need not even go that far here. Particularly in view of the fact that disclosure of an overseas CIA station’s *existence* is a far cry from disclosure of the *activities* carried on by that station (and whether they were carried on with the knowledge, acquiescence, or active participation of local intelligence agencies),⁶⁴ we see no inconsistency in the CIA’s position. We reject, as we have previously, the theory that “because *some* information about the project

⁶² Brief for Appellants at 52.

⁶³ 598 F.2d at 9. *See* *Military Audit Project v. Casey*, 656 F.2d 724, 744-45 (D.C. Cir. 1981):

Whatever the truth may be, it remains either unrevealed or unconfirmed. We cannot assume, as the appellants would have us, that the CIA has nothing left to hide. To the contrary, the record before us suggests either that the CIA still has something to hide or that it wishes to hide from our adversaries the fact that it has nothing to hide.

(footnote omitted). *See also* *Hayden v. Nat’l Security Agcy./Central Security Svc.*, 608 F.2d 1381, 1388 (D.C. Cir. 1979). While surely there are limits to this “reverse-psychology” analysis of the need for secrecy, those limits have not been tested in this case.

⁶⁴ Under the Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122 (June 23, 1982), *to be codified at* 50 U.S.C. §§ 421-26, it is a defense to the felony offenses defined by that Act that “the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.” 50 U.S.C. § 422(a). Although the statute does not define the term “intelligence relationship,” presumably the disclosures thereby exempted from the Act’s coverage are those which do not exceed the scope of the facts “publicly acknowledged” by the government.

ostensibly is now in the public domain, *nothing* about the project in which the appellants have expressed an interest can properly remain classified" or otherwise privileged from disclosure. *Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C. Cir. 1981); *cf. Hayden v. National Security Agency/Central Security Service*, 608 F.2d 1381, 1388 (D.C. Cir. 1979) (prior release of material did not bar agency from asserting FOIA exemption).⁶⁵

2. Because we find the Director's public affidavit adequate to support the district court's decision to uphold the claim of privilege we need not reach appellants' contentions regarding the *in camera* affidavit. Specifically, we need not consider appellants' claim that the court should

⁶⁵ A final argument advanced by appellants is that the district court erred in not evaluating the Director's claim of privilege against the terms of Executive Order 12065, 3 C.F.R. 190 (1979). Appellants assert that this Order, governing the *classification* of government information, imposed upon intelligence officials the duty to "balance the public interest in disclosure against the harm to the national security" in determining not only whether to declassify classified information but also whether to claim the privilege for secrets of state. *See* E.O. 12065, § 3-303 (agency head must decide "whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure"). As appellants concede, this order went into effect *after* the Director asserted the privilege. The argument therefore requires as a threshold matter that the court conclude *both* that the Executive Order governing classification also governs assertions of the state secrets privilege *and* that the courts should make reference to the order in effect at the time the claim of privilege is ruled upon rather than at the time it is made. We find it unnecessary to express an opinion on either issue. Executive Order 12065 has been superseded, effective August 1, 1982, by Executive Order 12356, signed by President Reagan on April 2, 1982. The new Order omits the "balancing" standard urged by appellants. *See* E.O. 12356, Part 3. Therefore, the district court's failure to require a showing that the Director had "balanced" the interests prior to claiming the privilege was at most harmless error.

have required a more complete articulation of the Director's claim on the public record in order to permit full adversary development of the issue of its adequacy. *Compare Philipp v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (requiring fuller public submissions) *with Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981) ("In national security cases, some sacrifice to the ideals of the full adversary process are inevitable."); *Hayden*, 608 F.2d at 1387-88; and *Halkin I*, 598 F.2d at 7. Appellants offer no reasons to suspect the Director's public affidavit of bad faith or inaccuracy. *Cf. Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (FOIA suit). Therefore, although the claim of privilege could in this instance have been upheld without reference to the *in camera* affidavit, the district court was free to satisfy itself of the credibility of the public affidavit by resort to the *in camera* submission. *Cf. Salisbury v. United States*, No. 81-1657, slip op. at — n.3 (D.C. Cir. —, 1982) (examination in FOIA action of *in camera* affidavit where public affidavit was adequate to support claim of Exemption 1).

3. Appellants are of the view that a claim of the state secrets privilege with respect to *documents* must be justified in accordance with the same procedures and the same ultimate burdens that obtain in cases seeking disclosure under the Freedom of Information Act. They contend that the refusal of the CIA to produce CHAOS documents or more fully to explain the redactions made in those which were produced violated these requirements. We disagree.

Appellants contend that the withholdings and deletions here should have been justified by a showing of the type required in FOIA cases by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). *Vaughn* mandates that government agencies claiming one or more of the statutory exemptions from the FOIA submit "a relatively detailed analysis in manageable segments" that "correlate[s] statements made in the Gov-

ernment's refusal justification with the actual portions of the document" sought to be withheld. 484 F.2d at 826-27 (footnote omitted). The customary means of complying with this mandate has been for the government to submit a "*Vaughn* index" itemizing each instance of claimed exemption, describing the document involved, and stating the specific exemption(s) asserted to apply. The index may be supplemented with representative exhibits illustrating the nature of the documents and the context of redactions made, and in some cases with *in camera* submissions which make evident the need for confidentiality.

We take note at the outset of the substantial effort already made by the Director in the case to provide the kind of specific explanation contemplated by *Vaughn* and its progeny. As stated above, the redactions made in documents provided in response to plaintiffs' request were usually accompanied by coded explanations indicating the type of information deleted.⁶⁶ The district court specifically found, in accordance with the language of *Reynolds*, that further explanation of the reasons for withholding information "is not required, *nor is it by and large possible, in the context of the present suit.*"⁶⁷ We agree with appellees and the district court that further justification was not called for.

First, the discovery sought here takes place in a context different from the statutory system of mandatory disclosure established by FOIA. Although the scope of civil discovery may well exceed the scope of FOIA-mandated disclosure in some instances, the *nature of the decision* to withhold information in the case of a claim of the state secrets privilege fundamentally differs from the decision to claim a FOIA exemption. The most important difference is that the claim of the state secrets privilege is a decision of *policy* made at the *highest level* of the execu-

⁶⁶ See note 26 *supra*.

⁶⁷ J.A. at 593.

tive branch after consideration of the facts of the *particular case*. The *Reynolds* requirements compel that it fulfill these requisites. Consequently, the risk of permitting relatively unaccountable “invisible” bureaucratic decisions as to the national security value of information (specifically, the decisions to classify information that trigger FOIA Exemption 1⁶⁸) to bar disclosure of information on a wholesale basis is not presented in a state secrets case.⁶⁹

Second, the unique status of national security information under *both* FOIA and general civil discovery practice militates against requiring broader disclosure here. In their zeal to impose the requirements of *Vaughn* indexing beyond the FOIA context, appellants largely ignore the purposes *Vaughn* itself sought to serve.

A *Vaughn*-type index of the withheld documents and redactions involved here would in fact serve little purpose. The *raison d’etre* of the *Vaughn* index is to permit a fuller adversarial examination of the justifications for withholding information which is presumed by statute to be available to the public. In cases where there is frequently doubt as to whether documents meet the threshold requirements of the asserted exemption—*e.g.*, the “investigatory record compiled for a law enforcement purpose” threshold

⁶⁸ Exemption 1, 5 U.S.C. § 552(b)(1) (1976), exempts matters that are “(A) specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”

⁶⁹ It bears noting that the state secrets privilege applies regardless of whether the information has actually been classified pursuant to the substantive and procedural requirements of applicable statutes or executive orders. *See, e.g.*, *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc) (state secrets privilege is valid defense to FOIA action independently of statutory exemptions). Although matter qualifying as a secret of state will presumably always qualify for classified status, the privilege operates on premises, rooted in the careful consideration by an executive officer in a policy-making role, entirely different from those governing the routine classification of information by lesser officials.

of Exemption 7 or the “medical or personnel files or similar files” threshold of Exemption 6 ⁷⁰—the *Vaughn* index permits the court, with the assistance of the requesting party, to determine whether the information qualifies for exemption. However, as *Vaughn* itself recognized, where the only question is whether information has been deemed by the executive to be so sensitive as to pose a risk to national security were it disclosed, a more detailed statement of the characteristics of the withheld information would serve no useful end. The executive’s resolution of the issue in favor of secrecy *terminates the inquiry under FOIA* just as it does under the state secrets privilege. See *Vaughn*, 484 F.2d at 824.

The innovation in *Vaughn* of the indexing requirement that now bears its name was, as that opinion will show, a response to cases *other than* those in which an actual executive determination of the need for secrecy had been demonstrated. *Id.* In this case, the information is of a sort “the factual nature of which was not disputed.” *Id.* Consequently, the rationale in *Vaughn* for imposing an indexing-and-explanation requirement—that the documents sought “do not indisputably fit within one of the exemptions to the FOIA,” *id.*—has no application to the information in the case at bar. In short, appellants argue for the expansion of the procedure that has no bearing in the first place on this case. ⁷¹ The district court was on

⁷⁰ See 5 U.S.C. § 552(b) (6) & (7) (1976).

⁷¹ This court’s holding in *Dellums v. Powell*, 642 F.2d 1351 (D.C. Cir. 1980), is not to the contrary. That case presented the question whether a detailed *Vaughn* index could be required to justify a claim of executive privilege made in response to civil discovery requests for production of presidential tape recordings. Critical to our affirmative answer there was the fact that the executive privilege asserted is a *qualified* one, requiring a transcript-by-transcript *balancing* of the interest in disclosure against the need for secrecy. See *id.* at 1363. As we have noted above, the state secrets privilege, being absolute, requires no such balancing. Once the court is satisfied as to the nature of the information withheld, the inquiry is at an end.

solid ground in refusing to compel production of documents on the basis of the Director's claim as asserted in the public affidavit without resort to any more detailed justification.

B. *Availability of Relief*

1. *Watchlisting*

In *Halkin I*, we held that because the state secrets privilege barred proof of the fact that particular communications were intercepted by NSA, the district court could properly dismiss claims against the NSA defendants⁷² based on the *acquisition* of plaintiffs' international communications. We are now presented with the related but not identical question whether the district court could also properly dismiss the claims for injunctive and declaratory relief against the CIA defendants based upon their *submission of plaintiffs' names* on "watchlists" to NSA.⁷³ Because we conclude that appellants are at present incapable of demonstrating that they have standing to challenge that practice, we affirm the district court's judgment.

The district court was of the view that as a result of the state secrets privilege holding in *Halkin I* regarding NSA interceptions, "plaintiffs cannot show any injury from having their names submitted to NSA because NSA is prohibited from disclosing whether it acquired any of plaintiffs' communications." Since a showing of "present or imminent future injury" was a "basic precept" of the relief sought, the court entered summary judgment for defendants on the claims for injunctive and declaratory

⁷² The interception claims were directed primarily at obtaining monetary relief from NSA officials in their individual capacities; however, plaintiffs also sought equitable relief against the NSA.

⁷³ Appellants concede that *Halkin I* bars the awarding of money damages against the individual CIA defendants for watchlisting. Brief for Appellants at 6 n.**.

relief with respect to future submission of watchlists to NSA by the agencies concerned with foreign intelligence.⁷⁴

Appellants argue that this judgment was error. They contend that *the very fact of submission* of names to NSA, as to which no claim of state secrets privilege has ever been made, “creates a sufficient threat of injury to warrant injunctive or at least declaratory relief enforcing Fourth Amendment protections” even in the absence of proof that the submissions actually resulted in the acquisition of communications to or from the named subjects.⁷⁵ A contrary ruling, it is argued, would create a dangerous variant of the “silver platter” doctrine⁷⁶ by permitting intelligence officials to insulate surveillance undertaken by others at their direction (*i.e.*, as a result of their submission of names to NSA) from fourth amendment scrutiny.

Before considering the merits of this position, it is necessary to define precisely the nature of appellants’ argument. That argument proceeds as follows: *if* the warrantless interception of a plaintiff’s communications would violate the fourth amendment, *then* watchlisting—which creates a substantial threat of such interception—would also violate the fourth amendment, just as the use of “silver platter” evidence by federal prosecutors does by encouraging unlawful searches and seizures by state officers.

The flaw in the argument is not in the validity of the if-then inference, but in the soundness of its premise.

⁷⁴ See J.A. at 766.

⁷⁵ Brief for Appellants at 49.

⁷⁶ The “silver platter” doctrine held that the fourth amendment exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914), barring use of unlawfully seized evidence in federal court, applied only to evidence seized by federal agents and therefore did not bar the use in a federal prosecution of evidence seized in the same fashion by state officers. The doctrine was repudiated in *Elkins v. United States*, 364 U.S. 206 (1960).

Manifestly, watchlisting *by itself* would never be a fourth amendment violation: the mere forwarding of a name by one agency to another involves no “search” or “seizure” triggering the constitutional limitation. Only the fact that the act of forwarding the name might *lead to* an *unlawful* search or seizure could make watchlisting constitutionally suspect. While appellants argue strenuously that watchlisting *leads to* interception, they fail to establish the critical second half of the premise, *i.e.*, that the resulting interception would be *unlawful*. In short, the “if” underlying their argument—if interception would violate their fourth amendment rights, then watchlisting would do so also—is nowhere proved.

Nor *can it be* proved. Our ruling in *Halkin I* is controlling on the point that the presence of one’s name on a watchlist cannot be presumed to establish that interceptions of one’s communications have occurred. Since it is the constitutionality of such interceptions that is the ultimate issue, the impossibility of proving that interception of any appellant’s communications ever occurred renders the inquiry pointless from the outset. The district court was therefore correct in applying *Halkin I* to the watchlisting claims against the CIA defendants.⁷⁷

⁷⁷ Compare *Jabara v. Kelly*, 476 F. Supp. 561 (E.D. Mich. 1979), *appeal pending* No. 80-1391 (6th Cir.) (submitted March 3, 1982). There, the court found that the fourth amendment was violated where the evidence showed that the FBI *had submitted* plaintiff’s name on a watchlist to NSA and NSA had supplied the FBI with summaries of plaintiff’s foreign wire communications it *had intercepted*. The court was at pains to distinguish its ruling from our opinion in *Halkin I*, on the specific ground that “[i]n this case, that threshold and ultimate issue [the fact of interception] *is an admitted fact*.” *Id.* at 578. The unavailability of other facts as to which a claim of the state secrets privilege had been upheld thus did not, as it does in this case, prevent plaintiff from going forward on his constitutional claims. Compare also *Sigler v. LeVan*, 485 F. Supp. 185, 199 (D. Md. 1980) (although privilege upheld, claim might still be established) and *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979) (same) with *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d

In holding that *Halkin I* concluded the watchlisting claims against the plaintiffs, the district court viewed the matter as one concerning the law of remedies: whether the inability to demonstrate the fact of acquisition barred an award of injunctive or declaratory relief against future submissions of names. While we do not disagree with this approach to the problem, we agree with appellees that a more serious flaw in appellants' claims for such relief is the problem of justiciability they present.⁷⁸ We hold that appellants' inability to adduce proof of actual acquisition of their communications now prevents them from stating a claim cognizable in the federal courts. In particular, we find appellants incapable of making the showing necessary to establish their standing to seek relief.

In *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), this court discussed at length the constitutional requirement of standing.⁷⁹ We stated:

The first, and primary inquiry, concerns the existence of "injury in fact, economic or otherwise," . . .

268, 281 (4th Cir. 1980) (en banc) (where claim would not be established without disclosure of privileged matter, dismissal proper) and *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 n.27 (S.D.N.Y. 1975) (same).

⁷⁸ The dichotomy between a party's standing and the availability of the relief he seeks is concededly not a rigid one. It is not by coincidence that "the most acute questions of standing characteristically arise in proceedings for an injunction or for a declaratory judgment . . . attacking the constitutionality of official action . . ." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 156-57 (2d ed. 1973). See *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). The critical fact here is that appellants cannot demonstrate *any* injury—past, present, or future—in connection with watchlisting.

⁷⁹ Although *Harrington* concerned the standing of a member of Congress to challenge allegedly unlawful practices of the CIA, we noted that "[a]lthough the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same." 553 F.2d at 190.

This requirement is the irreducible constitutional minimum which must be present in every case. If the court finds that there is no injury in fact, "no other inquiry is relevant to consideration of standing."

553 F.2d at 205 n.68 (citations omitted).

The standing issue is now ripe for our consideration. "Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial." *Gladstone, Realtors v. Village of Belwood*, 441 U.S. 91, 115 n.31 (1979). See *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 718 n.22 (D.C. Cir. 1977). In the present case, there can be little doubt that the complaint *alleged* facts—interception of plaintiffs' private communications—which if proved would constitute an injury in fact, permitting plaintiffs to go forward in an effort to prove the truth of those allegations and any consequent liability of the defendants. *United States v. American Telephone & Telegraph*, 642 F.2d 1285, 1291 (D.C. Cir. 1980). The sufficiency of those allegations must, however, be reevaluated in view of our ruling in *Halkin I* that *evidence* of the fact of acquisition of plaintiffs' communications by NSA cannot be obtained from the government, *nor can such fact be presumed* from the submission of watchlists to that Agency. In this situation, it can only be concluded that appellants are incapable of demonstrating that they have sustained a violation of their fourth amendment rights. That conclusion compels the finding that appellants are without standing to assert the watch-listing claims set forth in their complaint.

Appellants have alleged, but *ultimately cannot show*, a concrete injury amounting to either a "specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972). Although the contours of the CIA activity giving rise to appellants' claims

are spelled out in considerable detail in the record of this case and in the public reports on that activity, as we held in *Harrington v. Bush*, *supra*, a litigant is "required to allege that *he* has suffered some specific harm, not that the injury emanates from some specific source." 553 F.2d at 211 (emphasis added).⁸⁰ "It is the nature of the injury, and not the source, that is the primary focus of concern when dealing with the question of standing."⁸¹

⁸⁰ "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), *quoting* *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis in original).

⁸¹ *Id.* Even an allegation of very grave injury will be insufficient to establish standing if the injury cannot be shown to have been suffered *by the plaintiff*. "The question of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Reuss v. Balles*, 584 F.2d 461, 465 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1979), *quoting* *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Just as standing cannot be denied because of the relatively modest quantum of the injury, *see, e.g.,* *Southern Mutual Help Ass'n, Inc. v. Califano*, 574 F.2d 518, 523 (D.C. Cir. 1977); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1008 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), it cannot be upheld merely on the basis of the importance of the injury alleged, *see, e.g.,* *Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103 (1982); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *Richardson v. Miller*, 504 F. Supp. 1039, 1043 (W.D. Pa. 1980).

Although exceptions to this rule are recognized in those rare instances in which litigants are permitted to assert the constitutional rights of third parties, in such cases the constitutional issues presented are typically *facial* constitutional challenges capable of resolution without any significant development of a factual record. *See, e.g.,* *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Nat'l Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 543 (D.C. Cir. 1981) (appendix). *See generally* *Martin Tractor Co. v. Federal Election Comm.*, 627 F.2d 375 (D.C. Cir. 1980) (discussing "special status" of facial first amendment claims). In cases like the present one,

Consequently, the absence of proof of actual acquisition of appellants' communications is fatal to their watchlisting claims.

In terminating appellants' action on grounds that may make it extremely difficult ever to pursue similar claims, it is important to stress the dimensions of the question appellants ask us to resolve in passing on the constitutional status of watchlisting. The constitutionality of warrantless electronic surveillance of United States citizens in connection with foreign intelligence operations is a question that has been specifically reserved for decision by the Supreme Court. *United States v. United States District Court*, 407 U.S. 297, 308, 321-22 (1972).⁸² Were we to permit appellants to litigate the merits of that question in the district court, the focus of the proceedings would necessarily be upon "the 'reasonableness' of the search and seizure in question, and the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause." *Id.* at 309-10; *see id.* at 315. The valid claim of the state secrets privilege makes

the significance of the constitutional questions involved cannot obviate the need for proceeding upon a "full-bodied record." *Pub. Affairs Ass'n, Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

⁸² In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), a majority of the court were in agreement that the warrantless electronic surveillance within the United States of persons not suspected of any collaboration with foreign interests adverse to this country violates the fourth amendment. However, there was no opinion of the court on the question of warrantless surveillance of collaborators or suspected collaborators of foreign interests. *See id.* at 681 (opinion of McGowan, J.) (not reaching constitutional question); *id.* at 688 (Robb, J.); *id.* at 689 (Wilkey, J.); *id.* at 706 (MacKinnon, J.). For decisions finding warrantless foreign intelligence surveillance lawful, *see, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

consideration of that question impossible. Without evidence of the detailed circumstances in which the CIA forwarded appellants' names to NSA, the contents of communications intercepted as a result (in particular, whether the communications were sent or received *by* appellants or simply mentioned them), the duration of the appellants' stays on the watchlists, and like matters—in short, “the essential information on which the legality of executive action [in foreign intelligence surveillance] turns”⁸³—it would be inappropriate to resolve the extremely difficult and important fourth amendment issue presented. Determining the reasonableness of warrantless foreign intelligence watchlisting under conditions of such informational poverty, armed only with the fact that the CIA at some point submitted a watchlist without obtaining a warrant, would be tantamount to the issuance of an advisory opinion on the question. *See Chagnon v. Bell*, 642 F.2d 1248, 1263 (D.C. Cir. 1980) (dictum).

With no hope of a complete record and adversarial development of the issue, we cannot authorize such inquiry. The limits upon our consideration of such claims were stated by the Supreme Court in *Schlesinger v. Reservists Committee to Stop the War*:

Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treat-

⁸³ *United States v. Brown*, 484 F.2d 418, 427 (5th Cir. 1973) (Goldberg, J., concurring).

ment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

Moreover, when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily. This principle is particularly applicable here, where respondents seek an interpretation of a constitutional provision which has never before been construed by the federal courts.

418 U.S. 208, 221-22. Because here, as in *Schlesinger*, "it can only be a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant[s]," *id.* at 223, appellants' watchlisting claims were properly dismissed. Although "[u]nder this analysis there may indeed be illegal or unconstitutional actions which will go unchallenged *in a federal court* due to the lack of a proper party to [bring suit]," ⁸⁴ that is the result required here.

As in the other cases in which the need to protect sensitive information affecting the national security clashes with fundamental constitutional rights of individuals, we believe that "[t]he responsibility must be where the power is." *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). In the present context, where the Constitution compels the subordination of appellants' interest in the pursuit of their claims to the executive's duty to preserve our national security, this means that remedies for constitutional violations that cannot be proven under existing legal standards, if there are

⁸⁴ *Harrington v. Bush*, 553 F.2d at 197 n.31 (emphasis in original).

to be such remedies, must be provided by Congress.⁸⁵ That is where the government's power to remedy wrongs is ultimately reposed. Consequently, that is where the responsibility for compensating those injured in the course of pursuing the ends of state must lie. *United States v. Richardson*, 418 U.S. 166, 179 (1974).

2. *Executive Orders 12036 and 12333*

Appellants also sought declaratory and injunctive relief directed at foreign intelligence activity under Executive Order 12036, 3 C.F.R. 190 (1979). The district court rejected that claim on the basis of the fact that the plaintiffs "have not alleged injury or the threat of injury by surveillance undertaken pursuant to the Executive Order,"⁸⁶ and so lacked standing to attack that Order. Although that Order has been superseded by E.O. 12333 (1982), appellants suggest in their reply brief that since the more recent Order if anything permits expansion of the scope of foreign intelligence activity, their arguments should be considered notwithstanding the change in the nature of the beast they attack.⁸⁷

⁸⁵ Of course, Congress cannot create standing where none exists under the Constitution. *See generally* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

⁸⁶ J.A. at 768 n.5.

⁸⁷ Some question might be presented with respect to the mootness of appellants' claim in this respect. Appellants suggest that the "evanescent nature of Executive Orders," which are promulgated and withdrawn at the will of the President, makes it possible that by the time appellate review of the terms of such orders as those under consideration here can be had, those terms will be a dead letter. In fact, there have been three different Executive Orders governing foreign intelligence gathering in effect during the time spanned by this litigation. *See* E.O. 11652, 3 C.F.R. 678 (1976) (President Nixon); E.O. 12036, 3 C.F.R. 190 (1979) (President Carter); E.O. 12333 (1982) (President Reagan). We assume for present purposes, without deciding, that appellants' arguments with respect to E.O. 12036 may be considered as applying to the new order.

The result reached by the district court was clearly the proper one. For still more clearly than in the case of watchlisting, it is apparent that appellants here urge nothing more than a "generalized grievance"⁸⁸ against the intelligence-gathering methods sanctioned by the President. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-21. There is no allegation that *any* intelligence has been or is about to be gathered via the means allegedly permitted under the current order, much less an allegation of an injury in fact of any immediacy to any appellant.

This claim is squarely controlled by *Laird v. Tatum*, 408 U.S. 1 (1972). There, plaintiffs claimed that the mere existence of any Army program to gather intelligence on domestic civil disorders resulted in a "chilling" of their first amendment rights of speech, association and petition—precisely the injury asserted to arise in this case under the Executive Order.⁸⁹ Reversing a decision of this court which held the plaintiffs entitled to pursue their claim, the Supreme Court ordered the action dismissed as nonjusticiable.

Appellants' claim here, like those at issue in *Laird*, "is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information [needed] . . . and that the very existence of the . . . data gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights." 408 U.S. at 13. As the Court held there, "[a]llegations of a subjective 'chill' are not

⁸⁸ *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

⁸⁹ In connection with this claim, appellants note that some of the appellants "are presently engaged in political activities which are in opposition to current United States foreign policies and which bring them in contact with foreign organizations and individuals." J.A. at 692, *cited in* Brief for Appellants at 41. The claimed injury is that appellants will be deterred from continuing such lawful activity by the current Executive Order, which they assert renders them likely targets of surveillance. Brief for Appellants at 41.

an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . .” *Id.* at 13-14.⁹⁰ See also *National Student Association v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969).⁹¹ The fact that

⁹⁰ Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army’s intelligence gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army’s mission. . . .

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the “power of the purse”; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

408 U.S. at 14-15.

⁹¹ Compare *Jabara v. Kelly*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) (distinguishing *Laird* as an attack on “a general system of intelligence gathering”), *appeal pending*, No. 80-1391 (6th Cir.) (submitted March 11, 1982). The district court there pointed to several facts tending to show that the “chilling effect” of the surveillance involved was more than merely “subjective.” However, these facts were all *demonstrated in the record*—they were actual fact, rather than speculations about the sorts of surveillance the FBI *might* undertake under current interpretations of its authority. In the present case, there is no credible claim that the instances of surveillance of plaintiffs that have been admitted by the CIA, all of which occurred prior to 1974, bear any relationship to the particular terms of the Executive Order(s) they

appellants may have been subjected to surveillance under the policies of previous administrations cannot supply the missing causal link between that injury and the policies now under attack.

Since the first amendment claim asserted against the Executive Order must be dismissed as nonjusticiable, it follows *a fortiori* that the fourth amendment challenge to the Order must likewise be dismissed. Although the fourth amendment has been read as furnishing either a coextensive or a narrower scope of protection for private political activity compared to that provided by the first,⁹² it is apparent that the fourth amendment provides no *broad*er protection counselling a more liberal reading of the injury-in-fact requirement than is appropriate in first amendment cases. Consequently, a failure of standing for failure to allege injury to one's first amendment rights is in the present context fatal to fourth amendment standing as well.

3. CHAOS-type surveillance

The district court rejected appellants' claims for injunctive and declaratory relief directed at Operation CHAOS and similar intelligence gathering activities on the ground that they were based upon merely "hypothetical or speculative harm which is insufficient to support the grant of declaratory or injunctive relief."⁹³ Appellants argue that this ruling, which resulted in a grant of summary judgment in favor of appellees as to the CHAOS claims, was erroneous because (1) under current

now attack. Appellants' claim is therefore precisely the kind of generalized grievance barred from judicial consideration by *Laird*.

⁹² For a discussion of this question, see Reporters Comm. for Freedom of the Press v. American Telephone & Telegraph Co., 593 F.2d 1030, 1053-60 (D.C. Cir. 1978) (opinion of Wilkey, J.). See also *Jabara v. Kelley*, 476 F. Supp. 561, 570-75 (E.D. Mich. 1979), *appeal pending*, No. 80-1391 (6th Cir.) (submitted March 11, 1982).

⁹³ J.A. at 767.

executive policy (the Executive Order governing foreign intelligence activities) there continues to be a threat of unlawful CIA surveillance of domestic political activities, in which some appellants are still engaged; and (2) even if there is no basis for a permanent injunction against the CIA, a declaration that *past* surveillance under Operation CHAOS was unconstitutional does not depend upon any showing of present or threatened future harm and so should have been granted.

Unlike their contentions based upon watchlisting or the general terms of Executive Orders 12036 and 12333, appellants' claims for injunctive and declaratory relief from Operation CHAOS or similar programs directed at discovering foreign influence upon domestic dissident activity are based upon demonstrated injury in fact. The CIA has conceded that various identified and unidentified plaintiffs here were subjected to surveillance under Operation CHAOS.⁹⁴ Therefore, it is evident that at least some of the appellants—the nine *identified* as subjects of CHAOS surveillance⁹⁵—have standing in the constitutional sense to challenge the constitutionality of that surveillance and to seek appropriate relief upon proof of a violation of their rights.⁹⁶

⁹⁴ See note 28 *supra*. The mail opening claims referred to were settled between the parties and are not in issue on this appeal. See J.A. at 778.

⁹⁵ Leonard Adams, Nina Adams, Brown, DeNike, Halkin, Halliwell, Leigh Kagan, Schechter, Committee of Concerned Asian Scholars.

⁹⁶ Implicit in our analysis of the standing issue presented by the rather unique facts herein is the conclusion that claims asserted by plaintiffs whose very *identities* must remain undisclosed are beyond the scope of the federal judicial power. Absent the presence of an identifiable party whose claim of injury can be evaluated on its particular facts, the contentions raised here are simply a request for an advisory opinion. In such circumstances, there is no prospect that an adjudication will produce an adjustment of rights between two adverse parties—a prerequisite to the exercise of our

power under Article III. Although the situation is different from the watchlisting problem, in which the very *existence* of any person subjected to NSA surveillance at the instance of the Special Operations Group must remain an unknown, the result must be the same. Where there is no state of facts imaginable upon which the court could make a finding of concrete injury in fact to some identifiable person, the claim is but a "generalized grievance" not susceptible of federal judicial cognizance.

Even were we to hold that the claims of the unidentified plaintiffs were justiciable, moreover, it would still be necessary to dismiss their claims. As with any claim that the fourth amendment has been violated, the essence of appellants' claims is necessarily that the information gathering in question impinged upon a *justified expectation of privacy* in an *unreasonable* manner. *Katz v. United States*, 389 U.S. 347 (1967). Failure to establish either the threshold invasion of privacy or the ultimate unreasonableness of the search or seizure in question is fatal to a showing of liability, and *a fortiori* to proof of entitlement to a remedy of any kind. Our holding as to the state secrets privilege, which necessarily prevents access to the details (identification of liaison services and CIA methods of surveillance) surrounding the challenged surveillances, renders the unidentified plaintiffs incapable of proving any first or fourth amendment violation, and consequently of showing themselves entitled to injunctive or declaratory relief.

First, there is simply no way of determining, in the absence of details sufficient to identify the plaintiffs, what the privacy expectations of these individuals were and whether such were reasonable under the circumstances. The universe of relationships, movements, and activities of persons, and the manner in which they were carried out, comprehended by the vague descriptions of the surveillances here at issue, is simply too broad to permit even a beginning. There is no evidence, nor *can there be* any evidence adduced consistently with our holding on the state secrets privilege issue, that would tend to indicate whether *any* expectation of privacy attached to the information or communications obtained by Operation CHAOS.

Second, assuming that appellants did have a justified expectation that the information gathered under CHAOS would remain private, it cannot be demonstrated that the disappointment of that expectation constituted an "unreasonable" search or seizure in any instance. There is no *per se* rule

The factual basis of appellants' claims concerning the "gathering and compilation of nonpublic information" consists of a number of redacted CHAOS documents⁹⁷ which fairly indicate that the nine identified appellants were the subjects of CHAOS information collection in varying degrees of intensity. These documents were segregated by appellants and filed under seal with the district court pursuant to an order of April 8, 1980 requiring plaintiffs to submit documents supporting their statement of material facts as to which there exists no

requiring that surveillance of United States persons for foreign intelligence purposes be conducted only upon prior *judicial* approval. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), which dealt only with foreign intelligence *wiretaps* of the sort now governed by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, did not establish such a rule. Three of the eight judges participating expressed the view that the case presented the limited question of the constitutionality of warrantless wiretaps of persons concededly *not suspected of being foreign agents*, and one did not reach the constitutional question. Therefore it would first have to be determined whether the various instances of surveillance involved were subject to prior judicial approval, or instead qualified as exceptions to the general presumption that a warrant is required, and if the latter, then whether the warrantless searches or seizures themselves were reasonable. *United States v. Truong Dinh Hung*, 629 F.2d 908, 916 (4th Cir. 1980). Neither determination is possible in the factual vacuum presented here. The notion of deciding either constitutional question—whether a warrant is required in certain foreign intelligence surveillances, and if not, whether certain activities are "reasonable"—on a record devoid of any details that might serve even to identify the alleged victim of a violation is ludicrous. It calls for the issuance of an opinion on a case in which the crucial facts are all necessarily hypothesized—the textbook example of a case falling without the federal judicial power. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

⁹⁷ These include documents withheld in their entirety but whose existence and general nature are admitted by the CIA.

genuine dispute.⁹⁸ Although the bulk of the redacted documents by themselves provide no substantial basis for concluding that the information contained therein was not public information,⁹⁹ a number of them do provide a basis for arguing that the surveillance which produced their contents triggered fourth amendment protections.¹⁰⁰

Despite the sparse nature of these submissions, we cannot say that given these documented instances of CHAOS surveillance, plus whatever evidence appellants could adduce relating to the circumstances surrounding the subject activities, appellants are incapable as a matter of law of demonstrating at least a *prima facie* case of fourth amendment violations.¹⁰¹ The question therefore reduces

⁹⁸ See District Court Rule 1-9(h). The documents were filed under seal in order to prevent disclosure of the information contained therein which plaintiffs claimed was nonpublic.

⁹⁹ By "public information," we mean information as to which there can be no colorable claim of an expectation of privacy, *i.e.*, information the acquisition of which presents no fourth amendment concerns. While appellants' use may intend a substantially broader meaning—one encompassing information which is *in fact* not a matter of public knowledge at present even though its contents *could have been* readily gathered publicly at the time—we find it unnecessary to resolve the difference in meaning, since some of the information here meets our definition of "nonpublic."

¹⁰⁰ For example, the documents provided by the CIA concerning appellant Committee of Concerned Asian Scholars disclose, even in redacted form, information on the movements, activities, and communications of members of that organization that may well have been known only to the persons involved. These include the subjects discussed at a "Friday night meeting at the YWCA" and observations made by Committee representatives in the course of a trip to Communist China. The means by which this information was obtained—whether electronic or otherwise—are not disclosed. It is therefore possible that a justified expectation of privacy attached to at least some of the matters included in these documents, and that this information was collected by unreasonable means.

¹⁰¹ The same is true with respect to claims based upon the National Security Act of 1947, 50 U.S.C. § 403 (1976).

to one of the availability of the *remedies* to which appellants claim entitlement. The district court held that “plaintiffs’ claims for injunctive and declaratory relief are not based on a cognizable danger of recurrent violation, only on the speculative possibility thereof,”¹⁰² and therefore granted summary judgment in favor of defendants on those claims. We turn to the question of whether that judgment was an abuse of the district court’s discretion.

(a) *Injunctive relief*

In our view the district court’s decision to deny injunctive relief against the defendants was clearly in accord with established principles. Even assuming that appellants could make out a showing of liability on their fourth amendment or statutory claims, it would have been an abuse of discretion to enter an injunction restraining future foreign intelligence gathering operations conducted at the behest of the President. *See Laird v. Tatum*, 408 U.S. 1, 15 (1972). There is nothing in the record that indicates appellants’ ability to fulfill the traditional burden of proving the threat of imminent, specific and irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

Appellants concede that Operation CHAOS was terminated nearly a decade ago. It cannot escape judicial notice that the United States has in the intervening years experienced no domestic political strife approaching the magnitude of that which prompted two Presidents to seek the information which Operation CHAOS was designed to provide. Congressional response to the revelation of CHAOS and similar intelligence gathering activities has also altered the context in which appellants’ arguments are made—a principal example being the en-

¹⁰² J.A. at 768.

actment of the Foreign Intelligence Surveillance Act of 1978.¹⁰³

Although past surveillance gives the nine identified appellants standing to complain of injury, past injury alone is not sufficient to merit the award of relief against future conduct. A great deal more is required, particularly when the relief sought would broadly enjoin the conduct of vital governmental functions which require the exercise of discretion in a myriad of unpredictable circumstances.¹⁰⁴ “[J]udicial intervention to prevent potential injury from prospective government misconduct is only justified when such misconduct is imminent, not merely hypothetical.” *Exxon Corp. v. FTC*, 589 F.2d 582, 589 n.14 (D.C. Cir. 1978) (citing cases), *cert. denied*, 441 U.S. 943 (1979). To be entitled to invoke the injunctive remedy, a plaintiff must show “not only that *he personally faces an imminent threat of harm* but also that *the threatened harm is irreparable*.” *Reporters’ Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1067 (D.C. Cir. 1978) (emphasis in original); see also *id.* at 1075 (Robinson, J., concurring). See generally *id.* at 1067-70. In short, “[t]he mere possibility of future misconduct is simply not enough.” *Id.* at 1069.

Appellants’ allegation to the effect that six of their number are still engaged in active opposition to prevailing United States foreign policy, and are therefore more likely (than, presumably, citizens in general) to be subject to unlawful government surveillance aimed at domestic dissidents¹⁰⁵ adds nothing to their case. The fact that an individual is more likely than a member of the population at large to suffer a hypothesized injury, while

¹⁰³ Pub. L. No. 95-511, 92 Stat. 1783 (1978), *codified at* 50 U.S.C. § 1801-1811.

¹⁰⁴ See *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc).

¹⁰⁵ See note 89 *supra*.

perhaps lending support to his *standing* to complain, makes the injury no less hypothetical.

Appellants' principal argument against the district court's denial of injunctive relief appears to assume that the district court premised its judgment on the view that their claim was moot.¹⁰⁶ They consequently direct their attack against that premise. We think appellants' focus is misleading in this regard, as it seeks to confuse the doctrine of *mootness* in the context of injunction proceedings, which goes to the *justiciability* of the underlying claim, with the *substantive* principles governing the grant of equitable relief.

Appellants place primary emphasis on the rule of *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), which held that the burden is upon the *defendant* to show that a claim for injunctive relief has become moot in the Article III sense. But that opinion belies the conclusion that mootness was its sole concern; the Court was concerned with the requirements of equity as well as with those of the Constitution. It drew the distinction explicitly:

Along with its power to *hear the case*, the court's power to *grant injunctive relief* survives discontinuance of the illegal conduct. . . . But the moving party must satisfy the court that relief is needed.

Id. at 633 (emphasis added). Thus, while the burden is (as appellants contend) upon the defendant to show that a claim for injunctive relief has become *moot*, it lies with the plaintiff to show entitlement to the *remedy*.

Even were we to agree that the termination of Operation CHAOS did not render the case moot in the Article III sense of that term, then, that would not dispose of the issue of whether coercive relief was mandated here.¹⁰⁷

¹⁰⁶ Brief for Appellants at 41-44.

¹⁰⁷ Our holding *infra* that appellants' claim for declaratory relief must fail for mootness suggests that were the mootness

For the reasons set forth by Judge Wilkey in *Reporters Committee for Freedom of the Press, supra*, we affirm the district judge's exercise of her equitable discretion here.

(b) *Declaratory relief*

Our conclusions with respect to appellants' claims for injunctive relief—that while they are justiciable, they were correctly denied as a matter of equitable discretion—do not dispose of these issues as they are presented by appellants' claims for a declaration of the unlawfulness of CHAOS-type programs. The district court had the obligation “to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.” *Zwickler v. Koota*, 389 U.S. 241, 254 (1967).¹⁰⁸

of the claim for an injunction considered at length, it would likewise result in dismissal. In the typical case, claims for injunctive relief will tend to become moot before claims for a declaratory judgment. *See, e.g., Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115 (1974). Since we are of the view that appellants are in any event clearly barred by the requirements of equitable remedial doctrine from obtaining injunctive relief here, it is unnecessary to discuss the mootness question with respect to the injunction sought here.

¹⁰⁸ *See Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115, 121 (1974). The differences between the two forms of relief are articulated in some detail, although in a context involving federalism concerns not present here, in *Steffel v. Thompson*, 415 U.S. 452 (1974). The Court of Appeals in that case had affirmed the dismissal of a complaint for injunctive and declaratory relief from a local ordinance prohibiting the distribution of handbills at a private shopping center, holding that the standard governing both forms of relief required a demonstration of irreparable injury. *Id.* at 462-63. A unanimous Supreme Court reversed, ruling that under the circumstances, “the court erred in treating the requests for injunctive and declaratory relief as a single issue.” *Id.* at 463.

The essence of the declaratory remedy¹⁰⁹ is affording a form of relief, on the basis of acts either completed or threatened, which will operate to adjust the rights of the parties in cases where the award of a prospective coercive judgment would, for any of a number of reasons, be inappropriate.¹¹⁰ Thus it is the case, in contrast to the injunctive remedy, that a declaratory judgment may be appropriate even in a case where, due to a change of circumstances in the interval between the complained-of injury (or threat of injury) and the prayer for relief, there is no showing of a likelihood of imminent future harm or of the irreparable nature of the threatened injury.¹¹¹ Particularly where the parties are involved in an ongoing relationship that may present the opportunity for future disagreement—contracts of insurance being perhaps the classic example¹¹²—an adjudication may be appropriate.¹¹³

The foregoing considerations are, however, always subject to the minimum requirement of Article III. *Poe v. Ullman*, 367 U.S. 497, 506 (1961). As a result, notwithstanding the independent stature and comparatively broad discretionary availability¹¹⁴ of declaratory relief in the

¹⁰⁹ The declaratory judgment remedy is created in 28 U.S.C. § 2201 (1976).

¹¹⁰ See generally *id.*; C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2751-2765 (1973).

¹¹¹ *Perez v. Ledesma*, 401 U.S. 82, 123 (1971) (Brennan, J., concurring and dissenting).

¹¹² See C. Wright & A. Miller, *Federal Practice and Procedure* § 2760 (1973). See also *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (federal housing program).

¹¹³ See *Bituminous Coal Operators' Ass'n v. UMW*, 585 F.2d 586, 599 (3d Cir. 1978) (declaratory relief appropriate except where change of circumstances has made rights and obligations existing between the parties "so different . . . that the parties could derive no judgment preclusion benefit from an adjudication based upon past conduct").

¹¹⁴ See, e.g., *id.*

jurisprudence of federal remedies, nor the ability of appellants to demonstrate “injury in fact” here, the constitutional as well as statutory confinement of the federal judicial power in actions for declaratory relief to cases of “actual controversy” requires that attention be paid to the relationship of the parties as it subsists at the time it comes before us. *Steffel v. Thompson*, 415 U.S. 452, 460 (1974); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).¹¹⁵

Appellants contend that although both Operation CHAOS and the domestic unrest associated with the Vietnam era have ceased, the fact that the executive branch has not renounced all claims of power under the Constitution to conduct CHAOS-type programs in the future compels the conclusion that a live controversy still exists. This argument confuses the injury-in-fact requirement necessary to *standing* with the “liveness” showing necessary to avoid a dismissal for mootness. Both are constitutional conditions on the exercise of federal court jurisdiction. Thus, appellants’ assertion that here “the necessary case or controversy exists because defendants’ actions have affected plaintiffs adversely”¹¹⁶ demonstrates only a necessary, not a sufficient, condition for maintaining their action.

The controlling authority on the question of mootness in cases where declaratory relief is sought is *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 452 (1974).¹¹⁷ There

¹¹⁵ The district court’s citation of *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) evidences its consideration of this constraint. That case establishes the rule that even actions for declaratory judgment must satisfy the Art. III case-or-controversy requirement. *Super Tire Eng’r Co. v. McCorkle*, 416 U.S. 115, 122 (1974); *Steffel v. Thompson*, 415 U.S. 452, 460 (1974).

¹¹⁶ Brief for Appellants at 46.

¹¹⁷ Indeed, *appellants* argue that *Super Tire* governs the instant case.

an employer whose employees had gone out on strike after the expiration of a collective bargaining contract brought suit seeking injunctive and declaratory relief against the enforcement of state welfare laws which made the striking employees eligible for public assistance payments. The state programs were alleged to violate federal labor policy and the policies of the Social Security Act. When the strike ended before the district court could consider the claims for declaratory and permanent injunctive relief, the court dismissed the complaint as moot. The Court of Appeals affirmed.

The Supreme Court reversed, holding that while the prayer for an injunction was mooted by the employees' return to work, *id.* at 121-22, the request for declaratory relief remained viable. The parties, the Court held, "may still retain sufficient interests and injury as to justify the award of declaratory relief." *Id.* at 122.

Although the result in *Super Tire* was in favor of federal jurisdiction, critical to the Court's determination that the case for declaratory relief was not moot was the finding that the challenged public assistance programs constituted a government policy which was "fixed and definite," *id.* at 124, and so not likely to be frequently altered by the executive depending on changing economic circumstances. Justice Brennan, in writing for the Court, *distinguished* cases in which the injury asserted took effect only upon the exercise of the responsible government official's discretion. Discussing two prior decisions in which the Court had ruled actions by employers moot,¹¹⁸ he stated:

The governmental action challenged [in those cases] was the authority to seize the public utility, and it was clear that a seizure would not recur except in circumstances where (a) there was another strike or stoppage, and (b) in the judgment of the Gover-

¹¹⁸ *Oil Workers Unions v. Missouri*, 361 U.S. 363 (1960); *Harris v. Battle*, 348 U.S. 803 (1954).

nor, the public interest required it. The question was thus posed in a situation where the threat of governmental action was two steps removed from reality. This made the recurrence of a seizure so remote and speculative that there was no tangible prejudice to the existing interests of the parties and, therefore, there was a “want of a subject matter” on which any judgment of this Court could operate. *Oil Workers*, 361 U.S., at 371.

Id. at 123. Turning to the facts of *Super Tire*, it was observed that

The present case has a decidedly different posture. As in *Harris* and *Oil Workers*, the strike here was settled before the litigation reached this Court. But, unlike those cases, the challenged governmental action has not ceased. The New Jersey governmental action does not rest on the distant contingencies of another strike and the discretionary act of an official. Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion.

Id. at 123-24.

The Court’s resolution of the mootness question in *Super Tire* rested, therefore, on its finding that the governmental policy challenged in the original complaint was one essentially carved in stone and self-executing in nature—in short, one “not contingent upon executive discretion.”¹¹⁰ It was crucial to the result that the source of

¹¹⁰ It bears noting that while the *Super Tire* majority found the case not to be moot on the narrow ground set forth in text, four dissenting Justices *would* have held the case moot whether or not the challenged policy involved the exercise of discretion. The majority opinion in *Super Tire* is therefore properly read as marking the outermost boundaries of declaratory judgment actions satisfying the case-or-controversy requirement.

complaint was “a fixed policy directive” of the government.¹²⁰ By contrast, even if the current status of executive thinking on foreign intelligence gathering, as manifest in Executive Order 12333, constituted a “continuing and brooding presence, cast[ing] what may well be a substantial adverse effect” on appellants’ protected activities,¹²¹ the absence of any reason to believe that such a policy is being unlawfully pursued, coupled with the virtual tautology that no foreign intelligence policy could be one “not contingent upon executive [*i.e.*, Presidential] discretion,” places appellants’ claims for declaratory relief in the category of moot controversies.¹²²

¹²⁰ See Division 580, *Amal. Transit Union v. Central New York Regional Transportation Authority*, 578 F.2d 29, 33 (2d Cir. 1978).

¹²¹ 416 U.S. at 122. In view of our discussion of the appellants’ standing to complain of that “presence,” *supra* at 42-44, the soundness of that assumption is open to question.

¹²² See also *Rizzo v. Goode*, 423 U.S. 362, 374 (1976) (distinguishing *Hague v. CIO*, 307 U.S. 496 (1939) on ground that action there was “no mistaking that the defendants proposed to continue their unconstitutional policies”).

The unanimous decision in *Steffel v. Thompson*, 415 U.S. 452 (1974) is consistent with our reading of *Super Tire* and our conclusion based thereon. There, the Court faced the mootness question in a case in which the plaintiff had challenged an ordinance which barred him from distributing antiwar handbills. Holding that “we cannot ignore” the fact that the United States involvement in Vietnam had ended during the pendency of the litigation, *id.* at 460, the Court remanded for a finding on whether the plaintiff still desired to distribute handbills. Although here there is no question raised as to appellants’ desires to continue to engage in dissident political activity, the critical point is that the provisions of law which burdened the protected interests in *Steffel*—a trespass ordinance—was *still in force* there, while in the present case, Operation CHAOS has terminated. See *Super Tire*, 416 U.S. at 123, quoted *supra* at p. 55.

C. *Remaining issues*

Although we agree with appellants that our disposition of the state secrets privilege in the present appeal in favor of appellees does not *by itself* suffice to dispose of the non-privilege-related discovery issues raised on appeal,¹²³ we find that such holding *coupled with* its consequences for the justiciability and remedial issues discussed above does operate to moot the remaining questions concerning the scope and method of discovery permitted in the district court. Because we find no significant differences between the four appellants dismissed for failure to make discovery¹²⁴ and the remaining appellants in terms of our resolution of the justiciability and remedial questions, we likewise find it unnecessary to explore the contention that dismissal was an inappropriate sanction.

Finally, since the district court's judgments of dismissal and summary judgment on the claims remaining after our decision in *Halkin I* are affirmed as to the appellees generally, we need not reach the issues of personal jurisdiction over appellees Osborn and Angleton. Judgment against them would be inappropriate regardless of a resolution of the personal jurisdiction question.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Judgment accordingly.

¹²³ See discussion at p. 11 *supra*.

¹²⁴ See pp. 17-18 *supra*.

You are instructed that it is
~~never~~ permissible for the govt to
~~interfere~~

Healy v James, SDS case

Sweezy v N.H., HUAC case.

"Rational
Preserver"
→

"It may be that it is the
obnoxious thing in its mildest
& least repulsive form; but
illegitimate and unconstitutional
practices get their ^{first} footing in that
way, namely, by silent approaches
and slight deviations from legal
modes of procedure." Boyd v
U.S. 116 U.S. 616, 635.

Cited in Sweezy w/ approval at 354 U.S. 264.

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U.S. 114 U.S. 616, 635.

Cited in Sweezy w/ approval at 354 U.S. 264.

Fred B. BLACK, Jr., Appellant

v.

SHERATON CORPORATION OF
AMERICA et al.

No. 75-2034.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 1, 1976.

Decided Aug. 22, 1977.

Suit was brought seeking compensatory and punitive damages from hotel corporation alleging defendant, through its agents or employees, was involved in or was negligent in not preventing or discovering illegal eavesdropping operation carried out against plaintiff in defendant's hotel by agents of FBI. Plaintiff's motion to compel disclosure of FBI documents identifying hotel employees contacted by FBI agents who conducted operation was rejected in an interlocutory ruling by the United States District Court for the District of Columbia, John J. Sirica, J., 47 F.R.D. 263, and, following entry of final judgment by the District Court, Charles R. Richey, J., appeal was taken. The Court of Appeals, Leventhal, Circuit Judge, held that: (1) the district court did not act improperly when it conducted an in camera examination of the documents in question in determining the existence and scope of the informer's privilege, (2) the district court properly concluded that the balance of interests did not favor disclosure, and (3) plaintiff was not entitled to draw an adverse inference from the government's assertion of privilege to the effect that a hotel employee participated in the eavesdropping.

Affirmed.

See also 184 U.S.App.D.C. —, 564 F.2d 531.

damages alleging that defendant's agents or employees were involved in or were negligent in not preventing or discovering illegal eavesdropping operation carried out against plaintiff by Federal Bureau of Investigation agents in defendant's hotel, did not act improperly by conducting in camera examination of FBI documents which plaintiff sought to compel disclosure of in order to determine existence and scope of informer's privilege claimed by FBI since court itself must determine whether circumstances are appropriate for claim of informer's privilege, and yet do so without forcing disclosure of very thing privilege is designed to protect.

2. Federal Civil Procedure \approx 1275

"Informer's privilege" may be claimed as to persons who provide assistance to police on confidential basis other than by providing information; as long as there is assistance with expectation of confidentiality whether or not it is limited to provision of information, disclosure of identity of cooperating citizen may unfairly defeat his expectation of anonymity and effectively destroy his utility and other law enforcement efforts.

3. Federal Civil Procedure \approx 1275

In determining whether informer's privilege precludes disclosure of identity of persons who assist police, and in balancing benefits and harms from disclosure, court should take into account citizen's awareness, if any, that police were engaged in wrongful conduct.

4. Federal Civil Procedure \approx 1594

In suit for compensatory and punitive damages brought against hotel corporation alleging defendant, through its agents and employees, was either involved in or was negligent in not preventing or discovering illegal eavesdropping operation carried out

employees of defendant who were contacted by FBI agents who conducted operation where sole affirmative interest furthered by disclosure was possibility of obtaining punitive damages against hotel, and where no facts were presented tending to prove corporate participation in or approval of such operation as opposed to individual employee participation.

5. Federal Civil Procedure ¶ 1636

In suit brought against hotel corporation seeking compensatory and punitive damages based on allegations that defendant, through its agents and employees, was involved in, or was negligent in not preventing or discovering illegal eavesdropping operation carried out against plaintiff in defendant's hotel by FBI agents, plaintiff would not be entitled to draw adverse inference, from government's invocation of "informer's privilege" to prevent disclosure of FBI documents identifying hotel employees contacted by FBI agents who conducted operation, to effect that hotel employees participated in eavesdropping, since it was not hotel, but government that was asserting privilege and since hotel had no right to assert or waive privilege and had no special relationship to or influence over government.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 440-67).

Samuel M. Bradley, Washington, D. C., for appellant. Gerald S. Rourke and Edward P. Morgan, Washington, D. C., were also on the brief for appellant.

Neil R. Peterson, Atty., Dept. of Justice, Washington, D. C., with whom Rex E. Lee, Asst. Atty. Gen., and John J. Farley, III, Atty., Dept. of Justice, Washington, D. C., were on the brief for United States of America as amicus curiae.

Peter R. Sherman, Washington, D. C., with whom Alan L. Seifert, Washington, D. C., was on the brief for appellees, Wash-

ington Sheraton Corp. and Sheraton Corp. of America.

Before LEVENTHAL, ROBINSON and WILKEY, Circuit Judges.

Opinion for the Court filed by LEVENTHAL, Circuit Judge.

LEVENTHAL, Circuit Judge:

In 1963, the FBI conducted an illegal eavesdropping operation through a microphone put in the wall of the suite of Fred B. Black in the Sheraton Carlton Hotel in Washington, D. C. In this lawsuit, Black sues the Sheraton corporations (Sheraton)¹ for compensatory and punitive damages.

Our opinion in *Black v. United States*, decided this day, involving his damage action against the government, presents further background information.

Black's complaint against the Sheraton defendants contends that they, through their agents or employees, had been involved in the eavesdropping, and in the alternative that they were negligent in not preventing or discovering it. The district court granted summary judgment for the defendants.

The principal issue on this appeal is whether the district court unfairly limited the breadth of plaintiff's discovery by denying discovery of testimony and documents tending to reveal the identities of persons who may have assisted the FBI with the eavesdropping.

A

Prior to summary judgment, plaintiff engaged in extensive discovery. Plaintiff deposed John D. Bowen, who was assistant general manager of the hotel during the relevant period of time and later general manager, and Henry de Rooze, a subsequent general manager. Plaintiff also served two extensive sets of interrogatories on the Sheraton defendants regarding, *inter alia*, the knowledge and participation of their employees in the actions alleged in the

1. The two corporations which owned and operated the Hotel during the relevant period,

namely, Sheraton Corporation of America and the Washington Sheraton Corporation.

Complaint. The Sheraton defendants answered both sets under oath on behalf of some sixty employees, including all of the Sheraton employees at the time of the interrogatories who also had been employees at the time of the acts alleged in the complaint. The defendants also supplied the plaintiff with the name, last known address, and position of each former employee at the time of the eavesdropping who was not employed by the Sheraton defendants at the time of the interrogatories. Plaintiff's counsel acknowledges having investigated some of these individuals.

From all of this discovery, and from the depositions of the responsible FBI agents, there emerged no evidence of the hotel's complicity in the eavesdropping operation. An FBI agent checked into the hotel under an assumed name, and from a suite adjacent to Black's, FBI agents drilled a hole into the common wall for the microphone, which was not visible. The hotel management treated the FBI occupants like other guests, asking them to move down the hall when their suite was needed for a prior reservation. There was no evidence of the negligence of the hotel management in not preventing or discovering the operation, and there was no evidence that participation, if any, of their employees in the operation, was authorized, ratified or approved.

Plaintiff contends, however, that the district court erroneously limited his attempts to discover from the FBI agents the possible participation of any hotel employees. During the deposition of Special Agent Pennypacker, who was in charge of the FBI investigation of Black, several of plaintiff's questions met with an invocation of informer's privilege.² Among them was a question which asked whether Pennypacker had "any contacts with people employed by the Sheraton or in the hotel." Pennypacker refused to answer on the basis of a previous statement "that the Attorney General has

instructed [him] not to answer any questions which would tend to identify confidential informants."

Plaintiff moved to compel an answer. In response, the government submitted affidavits from the Attorney General, from the Assistant to the Director of the FBI, and from Special Agent Pennypacker, stating that a compelled answer would tend to reveal the identity of an FBI informant and would be harmful in developing other FBI informants. The district court also ordered all FBI documents relating to the confidential informants produced for an *in camera* inspection.

The district court rejected the motion to compel in a reported opinion. *Black v. Sheraton Corp.*, 47 F.R.D. 263 (D.D.C.1969). Judge Sirica ruled that the informer's privilege could apply to persons who cooperate with or assist a law enforcement agency on a confidential basis as well as to those who supply information. "Rather than to limit the class to whom the privilege is generally applicable", the court reasoned, "the better approach is to weigh the nature of the informer's role in determining whether disclosure is appropriate under the standards established by the *Roviaro* [353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639] decision." 47 F.R.D. at 265. The district court ruled that the FBI contacts involved here were informers within the accepted legal meaning of that word. Proceeding to balance the plaintiff's interest in disclosure against potential harms, the district court found that because the plaintiff could prosecute the parallel civil suit against the United States, his only interest in discovering the identities of the informants was to obtain punitive damage against the hotel. Weighing this interest, which it viewed as "minimal," against the public interest in preserving the anonymity of those who cooperate on a confidential basis with law enforcement authorities, the district court concluded that

2. Informer's privilege was invoked in response to inquiries whether the investigation of Black resulted from a lead obtained in Las Vegas, whether the investigation resulted from information obtained by eavesdropping in Miami, whether Pennypacker had learned from prior

investigations that Black was a representative of gambling interests in Las Vegas, and whether Pennypacker had information indicating that there were individuals in Washington receiving funds from Las Vegas gambling interests.

further testimony should not be compelled. The district court examined *in camera* the documents sought by the plaintiff and concluded that these were also covered by the informer's privilege. We denied interlocutory review.³

Plaintiff argues error by the district court in the interlocutory ruling (Judge Sirica) refusing to compel disclosure, and in the ensuing ruling (Judge Richey) granting summary judgment to Sheraton and failing to draw an adverse inference from the government's refusal to disclose its informants.

[1] In our view, the district court did not act improperly, as plaintiff argues, when it conducted an *in camera* examination of FBI documents in determining the existence and scope of the informer's privilege. As we discuss more fully in *Black v. United States*, the *in camera* inspection is a valuable technique for protecting the confidentiality of government documents while verifying a claim of privilege. We ordered such an *in camera* examination in *Westinghouse Electric Corp. v. City of Burlington*, 122 U.S.App.D.C. 65, 73, 351 F.2d 762, 770 (1965), noting that "[d]ocuments which are claimed to be privileged should normally be produced for inspection by the judge *in camera*." Other courts have approved *in camera* examination of the informer himself. *United States v. Jackson*, 384 F.2d 825 (3d Cir. 1967), *cert. denied*, 392 U.S. 932, 933, 88 S.Ct. 2292, 20 L.Ed.2d 1390 (1968).

A claim of informer's privilege presents the judiciary with a classic problem: "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *United States v. Reynolds*, 345 U.S. 1, 8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953). An *in camera* examination is an appropriate means of resolving this dilemma.

3. The district court certified its decision for interlocutory appeal. This court initially accepted the appeal, but after oral argument dismissed it on the ground that permission to take interlocutory appeal had been "improvidently granted." Nos. 23, 542, May 12, 1970. The

B

Plaintiff contends that "in the absence of any factual showing concerning the role of the 'informer' in this case, it must be presumed that what the persons connected with the hotel did was to take part or assist in the installation, operation or concealment of the electronic listening device used to eavesdrop upon Black's conversations." Reply Brief at 9. Plaintiff then argues that the informer's privilege is limited to "persons who furnish information of violations of law to officers charged with enforcement of that law"⁴ and does not include persons who assist law enforcement authorities in some other way.

The first answer is that the informant in this case did, in fact, provide information to law enforcement personnel. The affidavit submitted by Special Agent Pennypacker stated: "The informant in question was requested by me to obtain and did obtain certain types of information pertaining to Fred B. Black, Jr. . . ." We have verified this assertion through our own *in camera* inspection of the documents from the FBI file.

[2] However, the district court did not rely on that fact. Drawing on Judge Sirica's excellent opinion, and on subsequent authority, we approve the district court's ruling that the "informer's" privilege may be claimed as to persons who provide assistance to police on a confidential basis other than by providing information.

In *United States v. Bell*, 165 U.S.App. D.C. 146, 154 n.43, 506 F.2d 207, 215 n.43 (1974), this court stated:

[I]t is not unusual for informants to cooperate physically as well as informationally in criminal investigations, . . . and the reason underlying the privilege

Supreme Court denied certiorari, 403 U.S. 912, 91 S.Ct. 2208, 29 L.Ed.2d 689 (1971).

4. The language is taken from *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957).

of nondisclosure hardly distinguishes the two kinds of activities. . . . Nor have the courts made any such distinction.

These observations may have been dicta in the context of *Bell*, but they reflect sound doctrine. As long as there is assistance with an expectation of confidentiality, whether or not it is limited to provision of information, disclosure of the identity of the cooperating citizen may unfairly defeat his expectation of anonymity and effectively destroy his utility in other law enforcement efforts. Disclosure may discourage other persons from providing assistance to the police.

Our views are consistent with the available case law. "The scope of the privilege is limited by its underlying purpose." *Roviano v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). The Supreme Court defined that purpose broadly: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." *Id.* at 59, 77 S.Ct. at 627. As the Court noted:

The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Id. But this explanation was not intended to limit application of the privilege. Indeed, in the same paragraph the Court cited *In re Quarles and Butler*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895), in which the Court gave a broad explanation of the privilege:

It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of

any breach of the peace of the United States. It is the right, as well as the duty of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen, is a privileged and confidential communication.

158 U.S. at 535, 15 S.Ct. at 960. Consistent with this broad definition of the citizen's role, the courts of appeals have treated as informers those persons whose principal function was to provide a key and directions to the police, see *Wilson v. United States*, 59 F.2d 390 (3rd Cir. 1932), or to engage the defendant in certain transactions, see, e. g., *Gilmore v. United States*, 256 F.2d 565 (5th Cir. 1958); *United States v. Conforti*, 200 F.2d 365 (7th Cir. 1952), cert. denied, 345 U.S. 925, 73 S.Ct. 782, 97 L.Ed. 1356 (1953). We are not persuaded by plaintiff's citations for the contrary proposition.⁵

[3] Plaintiff argues that even if the informer's privilege generally applies to persons who assist the police, it should not be put at the disposal of those who participate in police misconduct, for no public policy is served by encouraging citizens to assist in official misconduct. This argument has some merit, for we would not want the privilege to create a sanctuary of anonymity for those who conspire with the police to violate the constitutional or personal rights of others. However, the citizen requested to help the police may not always know—or be able to find out—whether the police action is fully consistent with law. Thus

disclose the identity of a person who verified that the defendant was at home prior to his arrest. The court's statement that the undisclosed individual was "not an informer insofar as the crime or any element thereof was concerned" came within a discussion of the prejudice suffered and was not, as far as we can discern, intended to limit the applicability of the informer's privilege.

5. *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957), held that the common law privilege has no applicability to persons who undertake to tap wires in accordance with their employment. That holding is not applicable to the facts of this case.

In *Howard v. Allgood*, 272 F.Supp. 381, 384-85 (E.D.La.1967), *aff'd*, 402 F.2d 795 (5th Cir. 1968), the court held that the defendant had not been prejudiced by the refusal of the police to

we agree with the district court that the better approach to this problem is not to limit the scope of the privilege, but to take into account the citizen's awareness, if any, that the police were engaged in wrongful conduct, in deciding whether the privilege precludes disclosure, in balancing benefits and harms from disclosure.

C

In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Supreme Court held that an informer's claim to anonymity did not always prevail over competing interests:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

353 U.S. at 62, 77 S.Ct. at 628.

In *Westinghouse Electric Corp. v. City of Burlington*, 122 U.S.App.D.C. 65, 351 F.2d 762 (1965), this court applied the approach of *Roviaro*—a balancing of particular harms and benefits—to civil as well as criminal cases. 122 U.S.App.D.C. at 71-73; 351 F.2d at 768-70.

The district court sought to weigh the interest of plaintiff Black in disclosure against the public interest in confidentiality. It found that the "sole affirmative interest" furthered by disclosure was the possibility of obtaining punitive damages against the hotel (since compensatory damages would be available in the suit against the United States). The district court recognized that a recovery of punitive damages might "discourage private individuals from joining with the government in tortious conduct," 47 F.R.D. at 271. On the whole, Judge Sirica viewed the plaintiff's interest in discovery as "minimal."

On the other side of the balance, the district court weighed the government's continuing need to encourage the assistance of private individuals in law enforcement efforts. The district court grasped plaintiff's argument that "there was no danger of retaliation" in this particular case, but referred to our *Westinghouse* decision for the principle that "the privilege exists for the benefit of the general public, not for the benefit of the particular informer involved." 47 F.R.D. at 272, quoting 122 U.S. App.D.C. at 71; 351 F.2d at 768. After consideration of these and other factors, and an *in camera* inspection of the documents, the district court concluded that the balance did not favor disclosure in the circumstances of this case.

[4] We agree with the conclusion of the district court. We have considered plaintiff's interest in recovering punitive damages, the ample opportunities for discovery already provided, the nature of the informer's role, his awareness, if any, of the nature of the FBI activities, the possibility of reprisal, and the public interest in preserving the anonymity of cooperating citizens.

Particularly significant in this calculus of concerns is the weakness of plaintiff's interest in obtaining discovery. Plaintiff's lawsuit against the United States provides a solvent defendant and one whose agents were primarily, if not wholly, responsible for the wrongdoing. Even assuming for purposes of argument that the undisclosed individual was an employee of Sheraton and had some connection with the eavesdropping operation, the plaintiff has presented no facts tending to prove corporate participation in or approval of the hypothesized employee action. This would be necessary for punitive damages against the corporation, under *Woodard v. City Stores Co.*, 334 A.2d 189 (DCCA 1975).

D

Judge Richey's judgment was sound both in adopting the ruling of Judge Sirica, and in integrating that ruling into a summary judgment giving complete relief to Shera-

ton defendants. Plaintiff contends that even if the government is privileged to withhold the identity of the informer, plaintiff is entitled to an adverse inference from the nondisclosure to the effect that a Sheraton employee participated in the eavesdropping. This inference, plaintiff argues, is sufficient to resist Sheratons' motion for summary judgment.

We are dubious that an adverse inference can be drawn from a fully justified assertion of a privilege. The imposition of such a burden on those who invoke a privilege may discourage its exercise and thereby undermine the policies it was designed to serve.⁶

[5] For this case, however, it suffices to resist an inference against the Sheraton defendants that it is not they but the government that is asserting the privilege. In *International Union (UAW) v. NLRB*, 148 U.S.App.D.C. 305, 314, 459 F.2d 1329, 1338 (1972), we explained the adverse inference rule:

The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.

In this case it is clear that the Sheraton defendants have no control over the evidence not produced. The hotel (owner and management) has no right to assert or waive the privilege; it has no special relationship to or influence over the government; the hotel does not even know the identity of the informer or the contents of the withheld documents. It would be irra-

6. The Supreme Court has held that adverse comment on the failure of a defendant to take the stand violates his privilege against self-incrimination "by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). See generally Cleary, *McCormick's Handbook of the Law of Evidence* § 76 (2d ed. 1972) ("best solution is to

tional and unfair to draw an adverse inference against Sheraton from the government's assertion of privilege.

* * * * *

Plaintiff has failed to demonstrate a genuine factual issue as to either the involvement or negligence of the hotel⁷ with respect to the eavesdropping. The judgment of the district court is

Affirmed.



**A. F. STODDARD & COMPANY,
LTD., Appellant,**

v.

**C. Marshall DANN, Commissioner
of Patents.**

No. 76-1777.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 10, 1977.

Decided Aug. 26, 1977.

Assignee of patent applications filed reissue application, Serial No. 355,695, to correct error in issued patent and sought to amend pending continuation application, Serial No. 220,454, by correcting original declaration to show correct name of actual inventor. The Patent and Trademark Office Board of Appeals affirmed patent examiner's rejection of all claims in continuation application and all claims in reissue application, and appeal was taken. The United States District Court for the District

recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection," including foreclosure of adverse comment or inferences).

7. Judge Richey's opinion on the negligence issue.

^{*}
Alderman v US, 394 US 165 (1969) - disavowed in camera review

Coplon v US, 185 F2d 629, cert. den. 342 US 930

NAACP v. Alabama, 357 US 449 (1958)

* none of the special circumstances of these cases is present in Alderman nor issue of vicariously asserting 4th rights.

{ Shuttlesworth v. Birmingham, 394 US 147 (1969)

{ Barrows v. Jackson, 346 US 249

Alderman v US. (Criminal exclusionary rule case)
at 177 - A person's 4th A. rights are violated if either his conversations are overheard unlawfully (no warrant or consent) or if conversations on his premises are overheard whether he is there or not.

Private conversations as well as private premises are protected by 4B. Katz v. US, 389 US 347 (1967).

Hoffa v. US., 385 US 293 (1966) - Informant there had conversations in the hall, courthouse. He was not a surreptitious eavesdropper.

Alderman at 182

"we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened in camera by the trial judge." Even if ultimately no relevance
"winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance." "In apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller on the other end of the telephone, or even the manner of

of domestic political orgs. ... 605.

Because President must act "secretly & quickly" for the purpose of gathering foreign intell. info. (meaning info on foreign spies) then no warrant required & therefore no violation.

Strong dissent argues majority is not following Sup. Ct.

U.S. v. Coplon, 185 F.2d 629 (2nd Cir. 1950)
(J. Hand)

638 "A society which has come to witness at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path toward absolutism."

(in regard to allowing atomic spy access to wire tap logs even in natl. security case.)

Note, though, Hand admits there may still be "natl. security" deletions. But he orders discovery into identity of FBI informant to see if this was actually an illegal wiretap.

Subara v. Kelley 75 FRD 475 (discovery)
476 FS 561 (merits - granted injunction)

Subara v. Webster, 691 F.2d 272 (6th Cir. 1982)

Held ok to do in camera review of state secrets material. Not a 4th Ad. violation for FBI to obtain fruits of warrantless wire tap from NSA since NSA doesn't need a warrant - even of US citizens' overseas communications. So injunction reversed.

→ Ask John Shattuck if pet. for cert. filed & if he feels prior case law clear on no warrant for tap of US overseas calls.

Slippery use
of terms conscious

Sabara v Kelley, 75 FRD 475 (1977-Mich)

No mention of
cointelpro

Deals w/ Alderman as follows (in deciding against allowing pf. to come to in camera hearing): says that this case involves sensitive State & military secrets [but so did Alderman].

Notes also that Giordano v. U.S., 394 US 310 (1968) narrowed Alderman to cases where surveillance amounted to a 4th Ad. Violation.

Re: Informant's priv. - must show on-going bonafide criminal investigation. 494.

Kinoy v Mitchell, 67 FRD 1 (SSNY 1975)

Informant's priv. must be connected to an on-going invest. and ceases after a time. 12.

Mike
Ratner?
Rhonda
No mention
of cointelpro

This court discusses Giordano's "narrowing" of Alderman, referred to above in Sabara, and finds it is inapplicable to a 1st Ad. case - i.e. Giordano was a criminal case. p. 16

ACLU v Brown, 619 F.2d 1170 6th Cir. (1980)
[Part of Alliance case in Chicago]

Seeking discovery of Army domestic intelligence gathering manuals, these documents, unlike those in Halbin I, "do not strictly concern past and ongoing foreign intelligence gathering." 1174. "Nor do these documents appear to involve more than very general intelligence techniques." Remanded - aff. do not appear to cover military secrets.

The language in Webster's affidavit + Richardson's in Kinoy, n. 17, p. 7, is in significant part identical

Legal Research - Informers' privilege - WSP

Alliance Against Repression

Alliance ~~Against~~ To End Repression v. Rochford,
75 F.R.D. 435 (D.C. Ill. 1976)

Issued a prelim. injunction against police infiltration of pef. group + participation in legal strategy sessions on showing that same had occurred despite police protestations that it had stopped + no intention of doing it again. "Defendants' representations that they are no longer engaged in the infiltration activities are not enough, Gray v. Sanders, 372 U.S. 368 (1963). Id. 437.

Alliance, ~~439~~ 75 FRD 439

Given police willful destruction of files and subsequent refusal to turn over names of confidential informants, court imposed sanctions that certain parts of complaint be deemed proved + defendants could rebut.

Alliance 75 FRD 441

Sixoney order denying govt's argument that it can delete or fail to produce names of pef. orgs., others w/ whom pefs. associated, etc.

On informers' privilege, court cites Roviano v. U.S., 353 U.S. 77 (1957), a criminal case:

What is usually termed referred to as the informers' privilege is in reality the Govt's privilege to withhold from disclosure the identity of persons who furnish info of violations of law to officers charged w/ enforce -

ment of that law (Cites omitted). The purpose of the privilege is the furtherance & protection of the public interest in effective law enforcement."

445

"When, on the other hand, a citizen reports on purely lawful activities, law enforcement goals are not furthered and the informer need not fear bodily harm if his identity is disclosed. In cases in which purely lawful activity is reported, the informer's privilege does not apply, Allan, 75 FRD 428 (D.C. 1976)."

But since at this point, the complete lawfulness of pfs' activities is only an unproven allegation, court cannot disregard claim of privilege but on other hand cannot give it automatic recognition or else pfs' will never be able to test illegality of defendants' activities. So Court orders Fed. defendants to produce ~~files~~ ~~files~~ file numbers of ~~that~~ informers & info. for which a criminal investigation privilege is claimed all subject to a protective order.

Mem. Opinion to Reconsider above June 7, 1977 ruling that there is no informer's privilege for lawful activity surveillance:

Notes that law in D.C. Circuit is contra - Black v. Shurat Corp. of America, 564 F.2d 550, 554-5 (D.C. Cir. 1977) aff'g 47 FRD 263 (DDC 1969).

Now Court decides "the privilege may extend to situations where only lawful activities are reported on or where other instances of police misconduct are involved." See Kenyatta v. Kelly, 375 F.S. 1175, 1177 (E.D. Pa. 1974). "This Court further concludes that the unlawfulness of the

police activity and the extent to which the informer knew it was unlawful are more appropriately tested treated as factors to be weighed in the balance between the benefits ensuing from disclosure and the harm flowing therefrom. "Mem. Op. at 3. Cites Hobson order of Aug. 31, 1978 at 4.

Thus, Court finds there is an informer's privilege but it must be restricted to the "furtherance and protection of the public interest in effective law enforcement" and is limited by the requirement of fundamental fairness. After weighing all the factors, Court still finds in favor of disclosure. (Mem. Op. at 9.)

Among factors considered: fact FBI at times has itself disclosed identity of informer, thus undercutting its argument that informers must be able to rely on protection. Refer to Wesley Swearingen affidavit. Also to fact disclosure can be limited to lawyers and to fact many of the informers are in fact FBI agents or employees. These are not mere private citizens who voluntarily come forward on an ad hoc basis. Id. 14 Court reaffirms its earlier opinion that "the purpose of the privilege is not fostered by extending the privilege to these individuals." Id. 14.

The identity of the informers is especially critical because the alleged wrongful acts of federal defendants are asserted to have been carried out by the instrumentalities of informers and other confidential sources. Id. 15. "The privilege should not be used as 'a sanctuary of anonymity for those who conspire with the police to violate the constitutional or other personal rights of others.'" Black

1. Shuraton Corp., at 554; See also U.S. v. Keown, 19 F.S. 639, 645-46 (W.D. Ky. 1937).
(Judge Alfred Y. Kirkland)

Alliance To End Repression, 91 F.R.D. 182 (N.D. Ill. 1981)
[Now Judge Susan Getz Getzendanner]

Decision approving proposed settlement. In reviewing history of the litigation, court notes "the defendants' claim of informer's privilege was litigated extensively, overruled twice (75 FRD 445-6; Mem. Op. & Order of March 13, 1979), reconsidered ~~twice~~ twice, and ultimately not resolved."

p. 188.

ACLU v. Brown, 609 F.2d 277 (7th Cir. 1979)

On review of discovery order turning aside Army's "state secret" claim, 7th Cir. says standard for determining privilege claims is not found in U.S. v. Reynolds, 345 U.S. 1 (1953) but in FOIA and in reviewing district court's decisions, court of appeals will not simply apply an abuse of discretion standard but "will make its own inquiry into the interests claimed by the govt., giving [only] due deference to the purely factual determinations made by the Dist. Ct." Id. 281. But it reverses trial court & orders Army files kept secret - relying on exemption #7 of FOIA - investigatory records compiled for law enforcement purposes. (5 USC § 552(b)(7)(E).)

ACLU v. Brown, 619 F.2d 1170 (en banc 1980)
(totally concerns "state secret" doctrine)

Black v. Sheraton Corp. of America, 564 F.2d 530 (S.Ct.
[case against hotel] 1977) 1970

Black v. Sheraton Corp. of America, 564 F.2d 531
[case against govt.]

Parties agreed that Black had most of what he needed & wanted to prove his case. He had all FBI files derived from illegal wiretap. What he didn't have, but wanted, was his whole file to make sure govt. was being fair in deciding what came from the wiretap (& was actionable) and what did not (and was not actionable being the subject of a legitimate law enforcement investigation for possible income tax violations). Fed 542. Govt. asserted a sort of "executive privilege" for the files which court considers, calling it a "law enforcement evidentiary privilege." Govt. offered to make file available to court in camera but trial court (S. Richey) refused. Held: Trial court should have examined file in camera.

On applicability of 44 C.F.R. privilege to files here, "We begin w/ the proposition that there is indeed a public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigation techniques & sources." p 545.

"We recognize that because FOIA may be invoked by any person without a showing of need for the requested information, experience under that statute may not always be relevant to discovery in other types of civil litigation." p 547. In this case plf. has not made a strong showing of need.

In rejecting plf's argument that there be no privilege because files were gathered as part of

PMH
dicta

a "political intelligence" investigation, Court says it is unfortunate plf. used term "intelligence" because "it is clear from the factual context of this case that the information was being gathered in connection w/ an investigation of criminal activity (though not necessarily that of the plf.)." p 547.

So - govt. shall submit file in camera & bear burden of proving its contentions

Black v Sheraton Corp; I 524 F2d 531 1977
(US appeal)
(Sheraton appeal) II 524 F2d 550 1977

Jack Anderson

Judge John Pratt and the FBI

We have seen disturbing evidence that U.S. District Court Judge John H. Pratt tried to cover up an impropriety on the bench, then apparently lied to FBI agents about the incident, and finally tried to get the investigation called off by reminding the G-men that as a judge he has been "very" pro-government and especially pro-FBI.

If Judge Pratt was exaggerating his boasted bias to influence the agents, it would be bad enough. Attempting to block an FBI investigation constitutes obstruction of justice.

But if Pratt told the truth about his pro-government attitude on the bench, the implications are even more serious. It would mean that anyone who has appeared before Pratt since his appointment in 1968 was at a crippling disadvantage if the case involved a federal agency.

Our sources tell us Pratt wasn't kidding about his pro-government prejudice. This may explain the Justice Department's reluctance to pursue the investigation of Pratt.

By coincidence, we were involved in the original indiscretion that led to Pratt's more serious misconduct. Crack Washington private detective Richard East appeared in Pratt's courtroom on Jan. 30, 1978, and the judge remarked that "there's a rumor" East's Information Acquisition Corp. was "the creature of Mr. Jack Anderson."

East denied the rumor, and Pratt belatedly realizing the impropriety of spreading gossip from the bench, ordered the entire colloquy deleted from the court record. He did this without

consulting the attorneys in the case, as is required by law.

Not long afterward, Pratt's secretary and office manager, Kathleen McTier-nan, allegedly ordered court reporter Dennis Bossard to destroy his stenographic tape of the judge's improper remarks. A conspiracy to destroy court records is a felony punishable by up to five years in prison and a \$10,000 fine.

Bossard indignantly refused McTier-nan's order; instead, he wrote a memo about the incident minutes after she left. "She told me to tear up my notes," the memo stated. "When I told her I wouldn't do that, she told me to lie and say I didn't take it down."

Informed of the situation by East, the FBI decided to investigate the judge and his secretary. Justice Department officials—evidently leery of setting the FBI loose on a federal judge, and one of their favorites, at that—stalled the investigation for several days.

The FBI agents persisted. Because of the clear possibility of a criminal violation, the Justice Department finally gave a reluctant go-ahead. On Feb. 14, 1978, two agents—accompanied by a Justice Department official—interviewed Pratt.

The agents asked Pratt whether he had spoken with the court reporter, Bossard, about the incident. They knew he had spoken with Bossard just the day before, the reason they knew it was that they had a "secret" tape recording of the conversation.

Pratt told the agents he had spoken to Bossard on Feb. 6, 1978. He was asked repeatedly if he had discussed

the case with Bossard "in the interim"—that is, between Feb. 5 and the time of the FBI interview on Feb. 14. Pratt never mentioned the conversation in his chambers the previous day, though the only topic he and Bossard had discussed then was the deleted remarks and the ensuing controversy.

Our sources say the FBI agents were convinced that Pratt could not have forgotten a conversation he had less than 24 hours earlier, and that he was in fact lying to them. In any case, they have the tape of the conversation.

Pratt met with the FBI agents again on Feb. 16. Sources familiar with this meeting say the judge remarked that the case against him and his secretary was "cheap" and "not of prosecutable merit," and that interviewing his secretary would constitute "needless harassment."

He then tried to get the agents to tell him exactly what evidence they had uncovered. The agents properly refused to give him this information.

It was then, our sources say, that the judge pointedly reminded the G-men that he was "very pro-government and especially pro-FBI." It is a credit to the integrity of the FBI agents that they refused to be intimidated by the judge's tactics.

The FBI has since closed its investigation of the matter and no charges have been brought.

Footnote: Pratt, a 63-year-old ex-Marine who lost an arm in an accident in the Philippines, has refused to discuss the case with us. When we asked Pratt for his side of the story, we were told: "Write any damn thing you want."

The basis for the motion was an affidavit executed by plaintiff Abe Bloom (Attachment A). This affidavit referred to an article in the Washington Post by Jack Anderson (Attachment A, Exhibit 1). The newspaper article stated:

We have seen disturbing evidence that U.S. District Court Judge John H. Pratt tried to cover up an impropriety on the bench, then apparently lied to FBI agents about the incident, and finally tried to get the investigation called off by reminding the G-men that as a judge he had been "very pro-government and especially pro-FBI." [Emphasis added.]

Plaintiff Bloom's affidavit stated that, upon investigation (described in his affidavit), he became convinced that Mr. Anderson's article was accurate--that Judge Pratt had indeed admitted to holding a personal bias and prejudice in favor of the FBI in cases pending before him.

On November 9, 1979, the District Court denied plaintiff's motion, holding

that plaintiff's affidavit is factually insufficient to allege that the presiding judge has "a personal bias or prejudice" against or in favor of any party to this proceeding.

(Attachment B.)

The paragraphs which follow discuss petitioner's entitlement to the writ they seek.



ATTORNEY GENERAL'S GUIDELINES ON INVESTIGATIONS

MEMORANDUM FOR WILLIAM H. WEBSTER
Director, Federal Bureau of Investigation

Re: Attorney General's Guidelines on Domestic
Security/Terrorism Investigations

I am transmitting formally herewith an approved copy of the Attorney General's Guidelines on Domestic Security/Terrorism Investigations, which have been integrated with the Attorney General's Guidelines for General Crimes and Organized Crime Investigations. These guidelines, dated today, will become effective in 14 days.

As you have recognized, enterprises prone to terrorism or criminal violence for political or racist purposes are clearly no less dangerous to our citizens than those who operate lawlessly for financial gain. I am confident that these new guidelines will permit our agents to detect and prevent violent crime by such enterprises with greater certainty and effectiveness, while ensuring the public that they are acting properly under the law.

It is important that the FBI devote its criminal intelligence expertise to domestic security/terrorism cases as it has, with increasing success, in organized crime cases. In the past, operating under distinct guidelines setting different standards and procedures has hampered this effort. The new approach, combining both organized crime and domestic security investigations in a single set of guidelines, should make it easier for your agents to focus their intelligence efforts on those criminal enterprises which threaten our people to attain ideological goals.

These Guidelines are the product of more than eight months of careful review involving numerous components of the Department of Justice. This review process has been extremely worthwhile in demonstrating both the merits of guidelines generally and the need for certain specific revisions here. I greatly appreciate the efforts of you and your staff in helping to identify the precise concerns of field agents and in the critical drafting process itself. I think that the Guidelines will help the agents proceed with more confidence in this high priority area of law enforcement, while ensuring the public that these agents will continue to act within the law as first-class professionals.

I look forward to receiving your views with respect to other guidelines or related matters which may also warrant review.

/s/William French Smith
Attorney General

March 7, 1983

Section 3

THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS

As the primary criminal investigative agency in the federal government, the FBI has the authority and responsibility to investigate all criminal violations of federal law not exclusively assigned to another federal agency. The FBI thus plays a central role in national law enforcement and in the proper administration of justice in the United States.

Investigations by the FBI are premised upon the important duty of government to protect the public against general crimes, against organized criminal activity, and against those who would engage in political or racial terrorism or would destroy our constitutional system through criminal violence. At the same time, that duty must be performed with care to protect individual rights and to insure that investigations are confined to matters of legitimate law enforcement interest. The purpose of these Guidelines, therefore, is to establish a consistent policy in such matters. The Guidelines should encourage Agents of the FBI to perform their duties with greater certainty, confidence and effectiveness. They should also give the public a firm assurance that the FBI is acting properly under the law.

These Guidelines provide guidance for all investigations by the FBI of crimes and crime-related activities. Investigations involving foreign intelligence, foreign counterintelligence and international terrorism matters are the subject of separate guidelines. The standards and requirements set forth herein govern the circumstances under which an investigation may be begun, and the permissible scope, duration, subject-matters, and objectives of an investigation.

All investigations of crime or crime-related activities shall be undertaken in accordance with one or more of these Guidelines. Part I sets forth general principles that apply to all investigations conducted under these Guidelines. Part II governs investigations undertaken to detect, prevent and prosecute specific violations of federal law. Part III A governs criminal intelligence investigations undertaken to obtain information concerning enterprises which are engaged in racketeering activities involving violence, extortion or public corruption. Part III B governs criminal intelligence investigations undertaken to

obtain information concerning enterprises which seek to achieve political or social change through violence.

These Guidelines are issued under the authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533.

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I. GENERAL PRINCIPLES

Preliminary inquiries and investigations governed by these Guidelines are conducted for the purpose of preventing, detecting, or prosecuting violations of federal law. They shall be conducted with as little intrusion into the privacy of individuals as the needs of the situation permit.

All preliminary inquiries shall be conducted pursuant to the General Crimes Guidelines. There is no separate provision for a preliminary inquiry under the Criminal Intelligence Guidelines. A preliminary inquiry shall be promptly terminated when it becomes apparent that a full investigation is not warranted. If, on the basis of information discovered in the course of a preliminary inquiry, an investigation is warranted, it may be conducted as a general crimes investigation, or a criminal intelligence investigation, or both. All such investigations, however, shall be based on a reasonable factual predicate and shall have a valid law enforcement purpose.

In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States. When, however, statements advocate criminal activity or

indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these Guidelines may be warranted unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm.

General crimes investigations and criminal intelligence investigations shall be terminated when all logical leads have been exhausted and no legitimate law enforcement interest justifies their continuance.

Nothing in these Guidelines is intended to prohibit the FBI from collecting and maintaining publicly available information consistent with the Privacy Act.

Nothing in these Guidelines prohibits the FBI from ascertaining the general scope and nature of criminal activity in a particular location or sector of the economy.

II. GENERAL CRIMES INVESTIGATIONS

A. Definitions

(1) "Exigent circumstances" are circumstances requiring action before authorization otherwise necessary under these guidelines can reasonably be obtained, in order to protect life or substantial property interests; to apprehend or identify a fleeing offender; to prevent the hiding, destruction or alteration of evidence; or to avoid other serious impairment or hinderance of an investigation.

(2) "Sensitive criminal matter" is any alleged criminal conduct involving corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious organization or a primarily political organization or the related activities of any individual prominent in such an organization, or the activities of the news media; and any other matter which in the judgment of a Special Agent in Charge (SAC) should be brought to the attention of the United States Attorney or other appropriate official in the Department of Justice, as well as FBI Headquarters (FBIHQ).

B. Preliminary Inquiries

(1) On some occasions the FBI may receive information or an allegation not warranting a full investigation — because there is not yet a "reasonable indication" of criminal activities — but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads. In such circumstances, though the factual predicate for an investigation has not been met, the FBI may initiate an "inquiry" involving some measured review, contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.

This authority to conduct inquiries short of a full investigation allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit. This is especially important in such areas as white-collar crime where no complainant is

involved or when an allegation or information is received from a source of unknown reliability. It is contemplated that such inquiries would be of short duration and be confined solely to obtaining the information necessary to make an informed judgment as to whether a full investigation is warranted.

A preliminary inquiry is not a required step when facts or circumstances reasonably indicating criminal activity are already available; in such cases, a full investigation can be immediately opened.

(2) The FBI supervisor authorizing an inquiry shall assure that the allegation or other information which warranted the inquiry has been recorded in writing. In sensitive criminal matters, the United States Attorney or an appropriate Department of Justice official shall be notified of the basis for an inquiry as soon as practicable after the opening of the inquiry, and the fact of notification shall be recorded in writing.

(3) Inquiries shall be completed within 90 days after initiation of the first investigative step. The date of the first investigative step is not necessarily the same date on which the first incoming information or allegation was received. An extension of time in an inquiry for succeeding 30-day periods may be granted by FBI Headquarters upon receipt of a written request and statement of reasons why further investigative steps are warranted when there is no "reasonable indication" of criminal activity.

(4) Before employing an investigative technique in an inquiry, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether an intrusive technique should be used in an inquiry depends on the seriousness of the possible crime and the strength of the information indicating the possible existence of the crime. However, the techniques used in an inquiry should generally be less intrusive than those employed in a full investigation. It is recognized that choice of technique is a matter of judgment.

(5) The following investigative techniques shall not be used during an inquiry:

- (a) Mail covers;
- (b) Mail openings;
- (c) Nonconsensual electronic surveillance or any other investigative technique covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520.

(6) The following investigative techniques may be used in an inquiry without any prior authorization from a supervisory agent:

- (a) Examination of FBI indices and files;
- (b) Examination of records available to the public and other public sources of information;
- (c) Examination of available federal, state and local government records;
- (d) Interview of the complainant, previously established informants, and confidential sources;
- (e) Interview of the potential subject;

(f) Interview of persons who should readily be able to corroborate or deny the truth of the allegation, except this does not include pretext interviews or interviews of a potential subject's employer or co-workers unless the interviewee was the complainant;

(g) Physical or photographic surveillance of any person.

The use of any other lawful investigative technique in an inquiry shall require prior approval by a supervisory agent, except in exigent circumstances. Where a technique is highly intrusive, a supervisory agent shall approve its use in the inquiry stage only in compelling circumstances and when other investigative means are not likely to be successful.

(7) Where a preliminary inquiry fails to disclose sufficient information to justify an investigation, the FBI shall terminate the inquiry and make a record of the closing. In a sensitive criminal matter, the FBI shall notify the United States Attorney of the closing and record the fact of notification in writing. Information on an inquiry which has been closed shall be available on request to a United States Attorney or his designee or an appropriate Department of Justice official.

(8) All requirements regarding inquiries shall apply to reopened inquiries. In sensitive criminal matters, the United States Attorney or the appropriate Department of Justice official shall be notified as soon as practicable after the reopening of an inquiry.

C. Investigations

(1) A general crimes investigation may be initiated by the FBI when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed. The investigation may be conducted to prevent, solve, and prosecute such criminal activity.

The standard of "reasonable indication" is substantially lower than probable cause. In determining whether there is reasonable indication of a federal criminal violation, a Special Agent may take into account any facts or circumstances that a prudent investigator would consider. However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient.

(2) Where a criminal act may be committed in the future, preparation for that act can, of course, amount to a current criminal violation under the conspiracy or attempt provisions of federal criminal law, if there are present the requisite agreement and overt act, or substantial step toward completion of the criminal act and intention to complete the act. With respect to criminal activity that may occur in the future but does not yet involve a current criminal conspiracy or attempt, particular care is necessary to assure that there exist facts and circumstances amounting to a reasonable indication that a crime will occur.

(3) The FBI supervisor authorizing an investigation shall assure that the facts or circumstances meeting the standard of reasonable indication have been recorded in writing.

In sensitive criminal matters, as defined in paragraph A(2), the United States Attorney or an appropriate

Department of Justice official and FBIHQ shall be notified in writing of the basis for an investigation as soon as practicable after commencement of the investigation.

(4) The Special Agent conducting an investigation shall maintain periodic written or oral contact with the appropriate federal prosecutor, as circumstances require and as requested by the prosecutor.

When, during an investigation, a matter appears to arguably warrant prosecution, the Special Agent shall present the relevant facts to the appropriate federal prosecutor. In every sensitive criminal matter, the FBI shall notify the appropriate federal prosecutor of the termination of an investigation within 30 days of such termination. Information on investigations which have been closed shall be available on request to a United States Attorney or his designee or an appropriate Department of Justice official.

(5) When a serious matter investigated by the FBI is referred to state or local authorities for prosecution, the FBI, insofar as resources permit, shall promptly advise the federal prosecutor in writing if the state or local authorities decline prosecution or fail to commence prosecutive action within 120 days. Where an FBI field office cannot provide this follow-up, the SAC shall so advise the federal prosecutor.

(6) When credible information is received concerning serious criminal activity not within the FBI investigative jurisdiction, the FBI field office shall promptly transmit the information or refer the complainant to the law enforcement agencies having jurisdiction, except where disclosure would jeopardize an ongoing investigation, endanger the safety of an individual, disclose the identity of an informant, interfere with an informant's cooperation, or reveal legally privileged information. If full disclosure is not made for the reasons indicated, then whenever feasible the FBI field office shall make at least limited disclosure to the law enforcement agency having jurisdiction, and full disclosure shall be made as soon as the need for restricting dissemination is no longer present. Where full disclosure is not made to the appropriate law enforcement agencies within 180 days, the FBI field office shall promptly notify FBI Headquarters in writing of the facts and circumstances concerning the criminal activity. The FBI shall make a periodic report to the Deputy Attorney General on such nondisclosure and incomplete disclosures, in a form suitable to protect the identity of informants and confidential sources.

Whenever information is received concerning unauthorized criminal activity by an informant or confidential source, it shall be handled in accord with paragraph G of the Attorney General's Guidelines on Use of Informants and Confidential Sources.

(7) All requirements regarding investigations shall apply to reopened investigations. In sensitive criminal matters, the United States Attorney or the appropriate Department of Justice official shall be notified in writing as soon as practicable after the reopening of an investigation.

III. CRIMINAL INTELLIGENCE INVESTIGATIONS

This section authorizes the FBI to conduct criminal intelligence investigations of certain enterprises who seek either to obtain monetary or commercial gains or profits through racketeering activities or to further political or social goals through activities that involve criminal violence. These investigations differ from general crimes investigations, authorized by Section II, in several important respects. As a general rule, an investigation of a completed criminal act is normally confined to determining who committed that act and with securing evidence to establish the elements of the particular offense. It is, in this respect, self-defining. An intelligence investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation terminates with the decision to prosecute or not to prosecute, the investigation of a criminal enterprise does not necessarily end, even though one or more of the participants may have been prosecuted.

In addition, the organization provides a life and continuity of operation that are not normally found in a regular criminal activity. As a consequence, these investigations may continue for several years. Furthermore, as Justice Powell noted, the focus of such investigations "May be less precise than that directed against more conventional types of crime." *United States v. United States District Court*, 407 U.S. 297, 322 (1972). Unlike the usual criminal case, there may be no completed offense to provide a framework for the investigation. It often requires the fitting together of bits and pieces of information many meaningless by themselves to determine whether a pattern of criminal activity exists. For this reason, the investigation is broader and less discriminate than usual, involving "the interrelation of various sources and types of information." *Id.*

Members of groups or organizations acting in concert to violate the law present a grave threat to society. An investigation of organizational activity, however, may present special problems particularly where it deals with politically motivated acts. "There is often a convergence of First and Fourth Amendment values," in such matters that is "not found in cases of 'ordinary' crime." *Id.* Thus special care must be exercised in sorting out protected activities from those which may lead to violence or serious disruption of society. As a consequence, the guidelines establish safeguards for group investigations of special sensitivity, including tighter management controls and higher levels of review.

A. Racketeering Enterprise Investigations

This section focuses on investigations of organized crime. It is concerned with investigation of entire enterprises, rather than individual participants in specific criminal acts, and authorizes investigations to determine the structure and scope of the enterprise as well as the relationship of the members. Except as specified below, this authority may be exercised only when the activity engaged in by the racketeering enterprise involves vio-

lence, extortion, narcotics, or systematic public corruption.

1. Definitions

Racketeering activity is any offense, including the violation of state law, encompassed by the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961(1).

2. General Authority

a. The FBI has authority to conduct investigations of racketeering enterprises whose activities involve violence, extortion, narcotics, or systematic public corruption. A racketeering enterprise not engaged in such activities may be investigated under this authority only upon a written determination by the Director, concurred in by the Attorney General, that such investigation is justified by exceptional circumstances.

b. A racketeering enterprise investigation may be initiated when facts or circumstances reasonably indicate that two or more persons are engaged in a continuing course of conduct for the purpose of obtaining monetary or commercial gains or profits wholly or in part through racketeering activity. The standard of "reasonable indication" is identical to that governing the initiation of a general crimes investigation under Part II.

c. Authority to conduct racketeering enterprise investigations is separate from and in addition to general crimes investigative authority under Part II and domestic security/terrorism investigations under Part III. Information warranting initiation of a racketeering enterprise investigation may be obtained during the course of a general crimes inquiry or investigation. Conversely, a racketeering enterprise investigation may yield information warranting a general crimes inquiry or investigation or a domestic security/terrorism investigation.

3. Purpose

The immediate purpose of a racketeering enterprise investigation is to obtain information concerning the nature and structure of the enterprise, as specifically delineated in paragraph II D below, with a view to the longer range objective of detection, prevention, and prosecution of the criminal activities of the enterprise.

4. Scope

a. A racketeering enterprise investigation properly initiated under these guidelines may collect such information as:

- (i) The members of the enterprise and other persons likely to be knowingly acting in the furtherance of racketeering activity, provided that the information concerns such persons' activities on behalf of or in furtherance of the enterprise;
- (ii) the finances of the enterprise;
- (iii) the geographical dimensions of the enterprise; and
- (iv) the past and future activities and goals of the enterprise.

b. In obtaining the foregoing information, any lawful investigative technique may be used, in accordance with the requirements of paragraphs C 4 and 5 of Part I.

5. Authorization and Renewal

a. A racketeering enterprise investigation may be authorized by the Director or designated Assistant Director upon a written recommendation setting forth the facts and circumstances reasonably indicating the existence of a racketeering enterprise whose activities involve violence, extortion, narcotics, or systematic public corruption. In such cases the FBI shall notify the Attorney General or his designee of the opening of the investigation. An investigation of a racketeering enterprise not involved in these activities may be authorized only by the Director upon his written determination, concurred in by the Attorney General, that such investigation is warranted by exceptional circumstances. In all investigations, the Attorney General may, as he deems necessary, request the FBI to provide a report on the status of the investigation.

b. A racketeering enterprise investigation may be initially authorized for a period of up to 180 days. An investigation may be continued upon renewed authorization for additional periods each not to exceed 180 days. Renewal authorization shall be obtained from the Director or designated Assistant Director. The concurrence of the Attorney General must also be obtained if his concurrence was initially required to authorize the investigation.

c. Investigations shall be reviewed by the Director or designated senior Headquarters official on or before the expiration of the period for which the investigation and each renewal thereof is authorized.

d. An investigation which has been terminated may be reopened upon a showing of the same standard and pursuant to the same procedures as required for initiation of an investigation.

B. Domestic Security/Terrorism Investigations

This section focuses on investigations of enterprises, other than those involved in international terrorism, whose goals are to achieve political or social change through activities that involve force or violence. Like racketeering enterprise investigations, it is concerned with the investigation of entire enterprises, rather than individual participants and specific criminal acts, and authorizes investigations to determine the structure and scope of the enterprise as well as the relationship of the members.

1. General Authority

a. A domestic security/terrorism investigation may be initiated when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States. The standard of "reasonable indication" is identical to that governing the initiation of a general crimes investigation under Part II. In determining whether an investigation should be conducted, the FBI shall consider all of the circumstances including: (1) the magnitude of the threatened harm; (2) the likelihood it will occur; (3) the immediacy of the threat; and (4)

the danger to privacy and free expression posed by an investigation.

b. Authority to conduct domestic security/terrorism investigations is separate from and in addition to general crimes investigative authority under Part II, racketeering enterprise investigations under Part III A and international terrorism investigations under the Attorney General's Guidelines for Foreign Intelligence Collection and Foreign Counterintelligence Investigations. Information warranting initiation of an investigation under this section may be obtained through the course of a general crimes inquiry or investigation, a racketeering enterprise investigation, or an investigation of international terrorism. Conversely, a domestic security/terrorism investigation may yield information warranting a general crimes inquiry or investigation, a racketeering enterprise investigation, or an investigation of international terrorism.

c. In the absence of any information indicating planned violence by a group or enterprise, mere speculation that force or violence might occur during the course of an otherwise peaceable demonstration is not sufficient grounds for initiation of an investigation under this section. For alternative authorities see Part II relating to General Crimes Investigations and the Attorney General's Guidelines on "Reporting on Civil Disorders and Demonstrations Involving a Federal Interest." This does not preclude the collection of information about public demonstrations by enterprises that are under active investigation pursuant to paragraph B 1(a) above.

2. Purpose

The immediate purpose of a domestic security/terrorism investigation is to obtain information concerning the nature and structure of the enterprise as specifically delineated in paragraph (3) below, with a view to the longer range objectives of detection, prevention and prosecution of the criminal activities of the enterprise.

3. Scope

a. A domestic security/terrorism investigation initiated under these guidelines may collect such information as:

- (i) the members of the enterprise and other persons likely to be knowingly acting in furtherance of its criminal objectives, provided that the information concerns such persons' activities on behalf or in furtherance of the enterprise;
- (ii) the finances of the enterprise;
- (iii) the geographical dimensions of the enterprise; and
- (iv) past and future activities and goals of the enterprise.

b. In obtaining the foregoing information, any lawful investigative technique may be used in accordance with requirements of Part IV.

4. Authorization and Renewal

a. A domestic security/terrorism investigation may be authorized by the Director or designated Assistant Director upon a written recommendation setting forth the facts or circumstances reasonably indicating the existence of an enterprise as described in this subsection. In

such cases, the FBI shall notify the Office of Intelligence Policy and Review of the opening of the investigation. In all investigations the Attorney General may, as he deems necessary, request the FBI to provide a report on the status of the investigation.

b. A domestic security/terrorism investigation may be initially authorized for a period of up to 180 days. An investigation may be continued upon renewed authorization for additional periods each not to exceed 180 days. Renewal authorization shall be obtained from the Director or designated Assistant Director.

c. Investigations shall be reviewed by the Director or designated Senior Headquarters official on or before the expiration period for which the investigation and each renewal thereof is authorized.

d. Each investigation should be reviewed at least annually to insure that the threshold standard is satisfied and that continued allocation of investigative resources is warranted. In some cases, the enterprise may meet the threshold standard but be temporarily inactive in the sense that it has not engaged in recent acts of violence, nor is there any immediate threat of harm — yet the composition, goals and prior history of the group suggests the need for continuing federal interest. Under those circumstances, the investigation may be continued but reasonable efforts should be made to limit the coverage to information which might indicate a change in the status or criminal objectives of the enterprise.

e. An investigation which has been terminated may be reopened upon a showing of the same standard and pursuant to the same procedures as required for initiation of an investigation.

f. The FBI shall report the progress of a domestic security/terrorism investigation to the Office of Intelligence Policy and Review not later than 180 days after the initiation thereof, and the results at the end of each year the investigation continues. The Office of Intelligence Policy and Review shall review the results of each investigation at least annually.

IV. INVESTIGATIVE TECHNIQUES

A. When conducting investigations under these guidelines the FBI may use any lawful investigative technique. Before employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether a highly intrusive technique should be used depends on the seriousness of the crime and the strength of the information indicating the existence of the crime. It is recognized that choice of technique is a matter of judgment.

B. All requirements for use of a technique set by statute, Department regulations and policies, and Attorney General Guidelines must be complied with. The investigative techniques listed below are subject to the noted restrictions:

1. Informants and confidential sources must be used in compliance with the Attorney General's Guidelines on the Use of Informants and Confidential Sources;

2. Undercover operations must be conducted in compliance with the Attorney General's Guidelines on FBI Undercover Operations;

3. Undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment must be approved by FBIHQ, with notification to Department of Justice;

4. Nonconsensual electronic surveillance must be conducted pursuant to the warrant procedures and requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520;

5. Pen registers must be authorized pursuant to Department policy. This requires an order from a federal district court and an extension every 30 days, under the December 18, 1979, memorandum from the Assistant Attorney General in charge of the Criminal Division to all United States Attorneys;

6. Consensual electronic monitoring must be authorized pursuant to Department policy. For consensual monitoring of conversations other than telephone conversations, advance authorization must be obtained in accordance with established guidelines. This applies both to devices carried by the cooperating participant and to devices installed on premises under the control of the participant. See USAM 9-7.013. For consensual monitoring of telephone conversations, advance authorization must be obtained from the SAC and the appropriate U.S. Attorney, except in exigent circumstances;

7. Searches and seizures must be conducted under the authority of a valid warrant unless the search or seizure comes within a judicially recognized exception to the warrant requirement. See also, Attorney General's Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties;

8. Whenever an individual is known to be represented by counsel in a particular matter, the FBI shall follow applicable law and Department procedure concerning contact with represented individuals in the absence of prior notice to their counsel. The SAC or his designee and the United States Attorney shall consult periodically on applicable law and Department procedure.

V. DISSEMINATION OF INFORMATION

The FBI may disseminate information during investigations conducted pursuant to these guidelines to an-

other Federal agency or to a State or local criminal justice agency when such information:

A. falls within the investigative or protective jurisdiction or litigative responsibility of the agency;

B. may assist in preventing a crime or the use of violence or any other conduct dangerous to human life;

C. is required to be furnished to another Federal agency by Executive Order 10450, as amended, dated April 27, 1953, or a successor Order;

D. is required to be disseminated by statute, interagency agreement approved by the Attorney General, or Presidential Directive;
and to other persons and agencies as permitted by Sections 552 and 552a of Title V, U.S.C.

VI. COOPERATION WITH SECRET SERVICE

The FBI is authorized to provide investigative assistance in support of the protective responsibilities of the Secret Service, provided that all preliminary inquiries or investigations are conducted in accordance with the provisions of these guidelines.

VII. RESERVATION

A. Nothing in these guidelines shall limit the general reviews or audits of papers, files, contracts, or other records in the government's possession, or the performance of similar services at the specific request of a Department or agency of the United States. Such reviews, audits or similar services must be for the purpose of detecting or preventing violations of federal law which are within the investigative responsibility of the FBI.

B. Nothing in these guidelines is intended to limit the FBI's responsibilities to investigate certain applicants and employees under the federal personnel security program.

C. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any manner, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

/s/William French Smith
Attorney General

Date: March 7, 1983

THE DAILY WASHINGTON Law Reporter

Established 1874

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

NOTICE

The law regarding Post-Judgment Interest Rates has been amended by Section 302 of the Federal Courts Improvement Act of 1982, effective October 1, 1982. The Act establishes a new, uniform national interest rate, subject to change every four weeks. It will apply to money judgments (except tax cases) entered in District Courts. The new rate will be pegged to the average auction price of the last auction of 52-week Treasury Bills. Margaret Whitacre, Manager, Docketing Operations (535-3506), will have information on the current rate.

Interest accrues from the date the judgment is entered on the docket, and the date of such entry will forever determine the interest rate applicable to that judgment.

It is not clear what interest rate will apply to judgments entered before October 1, 1982, which remain unsatisfied thereafter. Two equally plausible legal theories are (1) that such judgments should accrue interests exclusively under state law in accord with previous practice, or (2) that the rate should be set under state law until October 1, 1982, and thereafter be changed to the Federal rate. The General Counsel of the Administrative Office of the United States Courts takes the first position, so Clerk's Offices nationwide will adopt it until or unless there is a judicial decision to the contrary.

James F. Davey
Clerk

4 - discussion of joint rule

8 - elements of civil conspiracy (p. 30)

9 - tacit agreement understanding sufficient to constitute agreement

9 - elements of aiding-abetting (p. 31)

10 - difference between civil conspiracy & aiding-abetting

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

12 - another definition of civil conspiracy (useful)

13 - civil conspiracy not independently actionable
United States Court of Appeals

14-17 - what is sufficient to establish agreement to pursue wrongful conduct, e.g., mutually supportive activity

17 - extent of liability of various co-conspirators
No. 82-1364
ELLIOTT JONES HALBERSTAM, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF

MICHAEL HALBERSTAM, DECEASED

17-26 - what constitutes substantial assistance or encouragement in aiding-abetting cases and extent of aider-abettors liability

BERNARD C. WELCH, JR., A/K/A NORM HAMILTON,
LARRY LEE BOONE, JOHN WILLIAM LANDIS,
BERNARD MILES, MYRON HENRY SNOW, JR.

LINDA S. HAMILTON, APPELLANT

29 - "Symbiotic activities" as a basis for liability
33 - need for flexibility of analysis - wonderful doing long on why
impt
for the District of Columbia

(D.C. Civil Action No. 81-00903)

Argued December 3, 1982

Decided April 12, 1983

Albert J. Ahern, Jr., for appellants.

Jacob A. Stein, for appellee.

Before: WALD, BORK and SCALIA, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

MAJOR CASE

WALD, *Circuit Judge*: Linda S. Hamilton appeals a judgment of the district court in a diversity action that she is civilly liable, as a joint venturer and coconspirator, for the killing of Michael Halberstam by Bernard C. Welch, Jr. on December 5, 1980, in the District of Columbia. The appellee, Elliott Jones Halberstam, is the personal representative of the estate of Michael Halberstam, her late husband. She brought this wrongful death and survival action¹ for damages on behalf of the estate, Michael Halberstam's two children, and herself. Halberstam alleged that Bernard Welch and Linda Hamilton engaged in a joint criminal venture and conspiracy in the course of which Welch killed Michael Halberstam while burglarizing the Halberstams' home. Welch failed to file an answer, and the district court entered a default judgment against him on May 19, 1981. Hamilton actively defended the suit, but after a nonjury trial on January 12, 1982, the court found her jointly and severally liable with Welch and entered a judgment against both in the amount of \$5,715,188.05. Hamilton now appeals the issue of her liability.² We conclude that the district court's findings of fact are not clearly erroneous, and that it applied the proper law; accordingly, we affirm the judgment against Hamilton.

I. BACKGROUND

This case arises out of the shocking climax to a coldly efficient criminal campaign that had confounded, frustrated, and ultimately terrorized the Washington area. We are asked to determine the civil liability of the passive but compliant partner to this rampage that left widowed the wife of one of the community's most eminent physicians. As a result of Welch's innumerable burglaries

¹ See D.C. Code Ann. §§ 12-101; 16-2701 to 2703.

² Hamilton did not appeal the district court's findings of fact and conclusions of law with respect to the issue of damages or the amount of the judgment.

over the course of five years, he and Hamilton acquired a fortune that would have been the envy of a Barbary brigand. In the words of the district court, Hamilton:

knew full well the purpose of [Welch's] evening forays and the means by which she and Welch had risen from "rags to riches" in a relatively short period of time. She closed neither her eyes nor her pocketbook to the reality of the life she and Welch were living. She was compliant, but neither dumb nor duped, so long as her personal comfort and fortune were assured. She was a willing partner in his criminal activities.

Halberstam v. Welch, No. 81-0903, mem. op. at 5 (D.D.C. Mar. 24, 1982) [hereinafter cited as District Court Opinion]. The district court based this conclusion largely on Hamilton's own testimony.

Hamilton first met Welch in October 1975, when Welch walked up to her in an apartment parking lot and asked her for a date. Hamilton stated that this was the first and only time she saw Welch with a gun. At the time of their meeting, Hamilton, a twenty-five-year-old high school graduate, worked as a secretary-compositor at the National Academy of Sciences. Welch told Hamilton that he bought estates and invested in coins, jewelry stores, and real estate. Welch moved into Hamilton's apartment a few weeks after their first meeting; apparently, his only assets at that time were a new Monte Carlo automobile, some clothing, a watch, pocket change, and some gold coins. They continued to live together, in various residences, until Welch shot Halberstam during the course of a burglary of Halberstam's home on December 5, 1980. Trial Transcript ("Tr.") at 12-15, 29-30; Hamilton Deposition at 4-5.

In 1976, Hamilton and Welch moved to a rented house in Falls Church, Virginia. Hamilton, still employed at this time, gave Welch her salary in cash to invest for her in gold coins. Welch had no outside employment, and

spent most days at home managing investments. He would leave the house four or five times each week between 5:00 p.m. and 5:30 p.m., and return between 9:00 p.m. and 9:30 p.m. This routine continued throughout the five years Hamilton lived with Welch.³ Hamilton stated that she never accompanied Welch on these evening expeditions. She did not think his absences peculiar, and said she never had a full discussion with him about where he had been. She assumed he was checking on his investments or meeting with coin and jewelry dealers. Hamilton remembered only one instance, in Minnesota, when she joined Welch on a visit to a coin dealer. Now and then Hamilton picked up coins for Welch from dealers, paying for the coins with cash Welch supplied. Tr. at 13-15, 17-18, 31; Hamilton Deposition at 6, 13, 23.

Soon Welch's "investments" bore fruit. In April 1978, after Hamilton gave birth to the first of their three children, Welch and Hamilton purchased a house in Minnesota for \$102,000. Welch contributed about \$55,000 in cash, and Hamilton put up about \$20,000. The house was titled in Hamilton's name. They lived in Minnesota during portions of 1978, 1979, and 1980. Tr. at 22, 32-36, 41, 116; Hamilton Deposition at 23-24.

In 1979, the couple built a home in Great Falls, Virginia, valued at \$1,000,000. Except for a trip to Minnesota during the summer, they lived in Great Falls from November 1979 until December 1980, when Welch was arrested for killing Halberstam. Hamilton's niece and the niece's child moved in with them. As suited their lifestyle, Welch and Hamilton bought two 1980 Mercedes-Benz cars and a station wagon, and hired a housekeeper. Tr. at 8, 18-19, 116; Hamilton Deposition at 12, 15; Plaintiff's exhibit 8.

³ As we note below, Hamilton and Welch spent a number of months in Minnesota. There is no mention in the record of whether or not Welch continued his evening routine while there.

Meanwhile, a different kind of refinement was taking place in the garage. With Hamilton's knowledge, Welch installed a smelting furnace in the garage and used it to melt gold and silver into bars. He then sold the ingots to refiners in other states. Hamilton typed transmittal letters for these sales. She also kept inventories of antiques sold, and in general did the secretarial work for Welch's "business." The buyers of Welch's goods made their checks payable to her, and she deposited them in her own bank accounts. She kept the records on these asymmetrical transactions—which included payments coming in from buyers, but no money going out to the sellers from whom Welch had supposedly bought the goods. Hamilton remembered no mail from dealers in antiques or precious metals. Tr. at 24-25, 42-43, 72-83, 119-22, 126-29; Hamilton Deposition at 6, 9, 14-15, 18-21.

Not surprisingly, given the "low" cost of Welch's materials, his business was a profitable one. By 1978 Hamilton and Welch had a gross annual income in excess of \$1,000,000. Hamilton's individual tax returns for 1978 and 1979 reported gross earnings of \$647,569.21 and \$491,762.16, respectively, from the sale of gold and silver. She took deductions, per Welch's instructions, for "cost of goods sold and/or operations" in 1978 and 1979 of \$498,770.87 and \$360,000, respectively—despite the absence of any evidence of payouts for such goods. Hamilton assumed that Welch filed a separate tax return. Tr. at 22-24, 31-48; Plaintiff's exhibits 6 and 7.

After the police apprehended Welch, they obtained a search warrant for the Great Falls house and discovered Welch's basement "inventory": some fifty boxes containing approximately three thousand stolen items—antiques, furs, jewelry, silverware, and various household and personal effects. While Hamilton admitted having seen the boxes, she claimed not to have seen their contents before. She said she did not go down to the basement often, although she had free access to it. In-

deed, she provided policemen the key to Welch's locked basement study.⁴ Tr. at 8-10, 15-16, 21-22, 95-96; Hamilton Deposition at 9-10, 18-19; Plaintiff's exhibits 4 and 5.

The district court concluded that this loot "was the source of [Welch's] and Hamilton's livelihood, income and investments. Disposing of the loot was the principal business in which Welch and Hamilton engaged while at home." District Court Opinion at 5.

II. ANALYSIS

The primary issues raised by this appeal are what kind of activities of a secondary defendant (Hamilton) will establish vicarious liability for tortious conduct (burglaries) by the primary wrongdoer (Welch), and to what extent will the secondary defendant be liable for another tortious act (murder) committed by the primary tortfeasor while pursuing the underlying tortious activity. To illuminate these issues, we need to clarify basic elements of vicarious liability in tort and to analyze case law to see what evidence is sufficient to establish them.

⁴ Hamilton's counsel had three police officers testify in her defense. They explained that Hamilton was cooperative when they came to her house after the murder to investigate Welch. She even gave the police permission to look through the house before they executed a search warrant. One or more also testified: to Welch's skill as a "con artist"; that other investigations had led to the conclusion that Welch acted alone; that before Welch met Hamilton, he had lived with (and presumably fooled) a woman who was an assistant principal of a high school; and they opined Hamilton had been unaware of what Welch was doing. Upon cross-examination, one or more officers revealed that they: did not realize the full extent of Hamilton's involvement with Welch's operations; might have had difficulty charging Hamilton because of jurisdictional restrictions; noted that all papers on transactions were in Hamilton's name and so concluded she helped sell the goods; and relied on Hamilton's permission to search the house when they first arrived without a warrant. See Trial Transcript ("Tr.") at 49-98.

Various theories of civil liability are untidily grouped under the general heading of concerted tortious action.⁵ To guide our deliberations, we initially outline a framework for this area of tort law, focusing on the two theories of liability the district court found applicable here—civil conspiracy, and aiding and abetting. We discuss a series of cases in the context of the framework, beginning with the sparse District of Columbia precedent. Then, after testing the district court's factual inferences against the "clearly erroneous" standard of review, we finally apply the law to these facts to determine Hamilton's liability for Michael Halberstam's death.

A. Legal Framework

Prosser notes that "[t]he original meaning of 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result." W. Prosser, *Law of Torts* § 46, at 291 (4th ed. 1971). His illustration portrays a standard situation that involved this "joint tort": combined action by tortfeasors on the scene together—"one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons." *Id.* (footnote omitted). Each was responsible for the others' actions.

Over time, courts applied the principle of vicarious liability for concerted action to less obvious situations, covering tortfeasors whose relationship was more subtle than Prosser's "highwaymen." The two variations significant here are (1) *conspiracy, or concerted action by agreement*, and (2) *aiding-abetting, or concerted action by substantial assistance*. These two bases of liability cor-

⁵ See, e.g., W. Prosser, *Law of Torts* § 46, at 291 (4th ed. 1971). See generally Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U.L. Rev. 921, 922-27 (1979) (explaining the history of civil conspiracy actions).

respond generally to the first two subsections in the *Restatement (Second) of Torts* § 876 (1979) [hereinafter cited as *Restatement*] on "Persons Acting in Concert":

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him [conspiracy],⁶ or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself [aiding-abetting], or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

(Emphasis added.) See *Pharo v. Smith*, 621 F.2d 656, 669 (5th Cir. 1980); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981).

As pristine legal concepts, conspiracy and aiding-abetting can be distinguished clearly enough. A list of the separate elements of civil conspiracy includes: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981).

⁶ The *Restatement* explains in "Comment on Clause (a)," that the term "conspiracy" is often used to refer "to a common design or plan for cooperation in a tortious line of conduct or to accomplish a tortious end." *Restatement* § 876, comment b.

The element of agreement is a key distinguishing factor for a civil conspiracy action. Proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement. See Prosser, *supra*, at 292; 16 Am. Jur. 2d *Conspiracy* § 68 (1979). But the agreement in a civil conspiracy does not assume the same importance it does in a criminal action. To establish liability, the plaintiff also must prove that an unlawful overt act produced an injury and damages.⁷ "It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable." Prosser, *supra*, at 293 (footnotes omitted).

Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. See, e.g., *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).⁸ In the "Comment on Clause (b)," the au-

⁷ We recognize that commentators debate whether the element of combination alone may make certain acts unlawful—even though they would not be so if performed independently by individuals. See, e.g., 16 Am. Jur. 2d *Conspiracy* § 53 (1979); Prosser, *supra* note 5, at 293; Note, *Civil Conspiracy*, *supra* note 5, at 946-49. However, we do not find it necessary to address that issue here.

⁸ *Investors Research*, *Woodward*, and *Landy* discuss these elements in the context of aiding-abetting violations in securities law. *Landy* draws its three-part statement of the elements from *Restatement* § 876(b). See 486 F.2d at 162-63. *Woodward* alters the *Landy* statement in part, by extending the second element from knowledge of the wrong's existence

thors of the *Restatement* summarize these elements and explain why they create liability: "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance." *Id.* § 876, comment d.

In practice, liability for aiding-abetting often turns on how much encouragement or assistance is substantial enough. The *Restatement* suggests five factors in making this determination: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind." *Id.*

*

The prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity. Aiding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.

Courts and commentators have frequently blurred the distinction between the two theories of concerted liability.⁹ Most commonly, courts have relied on evidence of

to awareness of a role in an improper activity, and by adding the scienter requirement in the third element. See 522 F.2d at 94-95. We employed the *Woodward* test in *Investors Research*. See 628 F.2d at 178. And of course these elements can be merged or articulated somewhat differently without affecting their basic thrust. See, e.g., *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (two part test: (1) unlawful intent—"knowledge that the other party is breaching a duty and the intent to assist that party's actions"; (2) provision of "substantial assistance or encouragement to the other party") (citations omitted).

⁹ See generally, *Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari*

assistance to the main tortfeasor to infer an agreement, and then attached the label "civil conspiracy" to the resultant amalgam. Sometimes, although not always, the inference has been factually justified; many tort defendants have both conspired with and substantially assisted each other. But we find it important to keep the distinctions clearly in mind as we review the facts in this novel case to see if tort liability is warranted on either or both concerted action theories. For the distinctions can make a difference. There is a qualitative difference between proving an agreement to participate in a tortious line of conduct, and proving knowing action that substantially aids tortious conduct. In some situations, the trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement. A court must then ensure that all the elements of the separate basis of aiding-abetting have been satisfied. For example, *Rael v. Cadena*, 93 N.M. 684, 604 P.2d 822 (1979) (liability for verbal encouragement at the scene of a battery), discussed below, involved aid that was unlikely to support a conclusion of agreement. Furthermore, it is difficult to conceive of how a conspiracy could establish vicarious liability where the primary wrong is negligence, but a secondary defendant could substantially aid negligent action. The theory of liability also affects who is liable for what. An aider-abettor is liable for damages caused by the main perpetrator, but that perpetrator, absent a finding of conspiracy, is not liable for the damages caused by the aider-abettor.

B. Case Law

We now proceed to examine case law in the context of this legal framework. Since this is a diversity case, we

Deliceto, Indemnification, and Contribution, 120 U. Pa. L. Rev. 597, 639-41 (1972) (noting lack of clarity in cases, and urging an effort to maintain the dichotomy between aiding-abetting and conspiracy to be sure each allegation can be proved).

look first to District of Columbia law.¹⁰ Because the District's precedent is somewhat sparse in the area of concerted torts, we then push on to case law in other jurisdictions, which, although certainly not binding, is illustrative of some key issues.

1. District of Columbia Precedent

District law acknowledges the concept of civil conspiracy, and assigns it the elements we outlined in section II. A., *supra*—basically, an agreement to take part in an unlawful action or a lawful action in an unlawful manner, and an overt tortious act in furtherance of the agreement that causes injury. Early on, the tort of civil conspiracy was described as follows: “The essence of conspiracy is an agreement—together with an overt act—to do an unlawful act, or a lawful act in an unlawful manner.” *Cooper v. O'Connor*, 99 F.2d 135, 142 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938). *Accord Edwards v. James Stewart & Co.*, 160 F.2d 935, 936-37 (D.C. Cir. 1947); *International Underwriters, Inc. v. Boyle*, 365 A.2d 779, 784 (D.C. 1976).¹¹ Subsequent cases empha-

¹⁰ Because the Rules of Decision Act, 28 U.S.C. § 1652, is not applicable to the District, we are not strictly required by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to ascertain and apply District law. We have decided in earlier cases, however, that the *Erie* doctrine should be analogously applied by federal courts exercising diversity jurisdiction in the District. See *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360-61 (D.C. Cir. 1983) (per curiam); *Steorts v. American Airlines, Inc.*, 647 F.2d 194, 196-97 (D.C. Cir. 1981).

¹¹ *International Underwriters*, which involved allegations of induced breaches of fiduciary duty, presents a relatively recent summary by the District of Columbia Court of Appeals of a civil conspiracy action:

If [the plaintiff] can establish that [one defendant] participated in or induced the alleged wrongful actions of [a second defendant] pursuant to an agreement, then

size that agreement can only lead to liability if an act pursuant to it causes injury. See *DeBobula v. Goss*, 193 F.2d 35, 36 (D.C. Cir. 1951); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971) (“gist of a civil conspiracy . . . is not the agreement . . . , but the civil wrong . . . done pursuant to the agreement”), *motion for stay denied*, 447 F.2d 1280 (1971) (per curiam), *supplemented*, 337 F. Supp. 296 (1972). The requirement of an actionable injury may explain why “there is no recognized independent tort action for civil conspiracy in the District of Columbia.” See *Waldon v. Covington*, 415 A.2d 1070, 1074 n.14 (D.C. 1980) (emphasis added) (citing *Lamont v. Haig*, 590 F.2d 1124, 1136 n.73 (D.C. Cir. 1978)). Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.

The separate tort of aiding-abetting has not yet, to our knowledge, been recognized explicitly in the District, but the existence of the civil conspiracy action suggests a high probability that the legal rationale underlying aiding-abetting would also be accepted: The District law recognizes that a person's actions in support of a wrong may make him liable for the tortious injury (*i.e.*, civil conspiracy is only a means through which a plaintiff can establish vicarious liability, not an independent wrong). An agreement to participate in a wrongful course of action suffices to create vicarious liability. It seems likely that the District's courts would also find vicarious liability for support of wrongful action through knowing substantial aid or encouragement.

[the first defendant] is liable as a conspirator for the damages proximately caused by these wrongs.

365 A.2d at 784 (emphasis added) (citing *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971), *motion for stay denied*, 447 F.2d 1280 (1971) (per curiam), *supplemented*, 337 F. Supp. 296 (1972)).

2. *Civil Conspiracy Elsewhere*

A few cases in other jurisdictions have considered more carefully than the District of Columbia two issues at the heart of Halberstam's conspiracy case against Hamilton: what kind of evidence is sufficient to establish an agreement to pursue wrongful conduct, and the extent of liability for acts performed by a coconspirator.

Both issues arose in *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979), which involved a civil conspiracy to commit burglary. The boy whose liability was in question was the driver of a getaway truck. One of his co-defendants, who had been inside the burglarized building, had struck an investigating policeman on the head with a hammer. Even though the driver never entered the building and had beaten a hasty retreat from the scene when the police appeared, the court held he could be liable to the injured policeman on a conspiracy basis. The court observed that "[a] conspiracy need not be established by direct evidence . . . but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished." The court stated that the finding of a conspiracy would be justified if the defendants' acts revealed that they had "pursued the same object, although by different means, one performing one part and another another part." 280 N.W.2d at 648-49 (citation omitted). On the issue of extent of liability, the *Davidson* court asserted that once the conspiracy had been established, all parties to it would be liable for injuries from acts pursuant to and in furtherance of the common design, even if the parties had not actively participated or benefited by the particular acts resulting in injury. *Id.* at 649 (citation omitted).

The *Davidson* court cited a similar case: *Tabb v. Norred*, 277 So. 2d 223 (La. App.), *cert. denied*, 279 So. 2d 694 (1973), in which two armed boys burglarized

a school and one shot an investigating officer. The boy who did not shoot the deputy argued that he was not liable because he had not fired the injurious shot and had not assisted in or encouraged the shooting; indeed, the boy had been disarmed by police before the deputy was wounded. The boy further argued that even if there had been a conspiracy, it had not contemplated gunfire. The court held that both boys were liable for the shooting under a statute that established liability for *assisting or encouraging* a person in the commission of an unlawful act. Its analysis, however, merged the conspiracy and aiding-abetting theories. The court based a finding of conspiracy on the boys' joint action of breaking into the school with pistols. Since both boys carried pistols and fired them at the police to avoid apprehension, the court found that the wounding shot was not beyond the scope of the conspiracy.

One might reasonably conclude from these cases that where two or more persons jointly commit an onsite burglary, a court will infer that there has been a prior agreement to do so, and that a violent act is within the reasonable scope of such an agreement, particularly when both persons are armed.

Peterson v. Cruickshank, 144 Cal. App. 2d 148, 300 P.2d 915 (1956), extends the reasoning about inferring agreement to a situation where, as in this case, the parties did not execute the tort together at the same time and place. In *Peterson*, the issue was "whether there [was] any substantial evidence to support the finding that appellant conspired with his two co-defendants to falsely imprison [appellant's consort]," *id.* at 925, in a sanitarium where she received shock treatments. The appellant protested that all he had done was pay his consort's bills; he had neither directed the doctor at the sanitarium to imprison her or administer shock treatments. The court observed that, absent a confession, an agreement between conspirators must generally be in-

ferred from circumstantial evidence revealing a common intent; it found a number of circumstances that permitted the inference that appellant had reached an understanding with his codefendants about the restraint and treatment of his consort. First, appellant's past stormy personal relationship with the woman had provided him a motive to have her restrained. Second, there was evidence of a conversation within a few days of the confinement between appellant and a codefendant doctor at the sanitarium. In this conversation, appellant and the doctor had discussed appellant's falling out with the woman, the history of appellant's relationship with her, and appellant's willingness to pay all bills for her "treatment." After the talk, the doctor had refused to let the woman's sister take her home; he also secured, under suspicious circumstances and over her sister's objection, the woman's "consent" to shock treatments. Furthermore, before the woman left the sanitarium, appellant sent an attorney to induce her to sign a release of "all claims." The court found such evidence sufficient to sustain the finding of a conspiracy between appellant and the doctor to imprison the woman against her will.

Davidson, Tabb, and *Peterson* provide some insights into the amount and kind of evidence necessary to establish prior agreement as well as into the extent of liability for a coconspirator's acts. *Davidson* and *Peterson* in particular recognize that since in most cases the court will have to infer a conspiracy from indirect evidence, it must initially look to see if the alleged joint tortfeasors are pursuing the same goal—although performing different functions—and are in contact with one another. The circumstances of each case dictate what other specific evidence may be useful in inferring agreement. The easiest situation in which to draw the inference of agreement is where the parties are on the scene together at the same time performing acts in support of one another. This description approximates *Tabb*: two armed persons

travel together to a building, both break in, and both shoot when confronted by police. In *Davidson*, the defendants were performing different but connected acts, relatively close in time and location: driving the getaway vehicle and breaking in. The performance of different acts at different times in different places, as in *Peterson*, requires a more extensive set of inferences to link the actors together. But such inferences are still sustainable in the proper factual setting. Additionally, the length of time two parties work closely together may also strengthen the likelihood that they are engaged in a common pursuit. Mutually supportive activity by parties in contact with one another over a long period suggests a common plan.

In sum, we expect that the relationships between the actors and between the actions (*e.g.*, the proximity in time and place of the acts, and the duration of the actors' joint activity) are relevant in inferring an agreement in a civil conspiracy action. There may well be other significant factors in individual cases.

As to the extent of liability, once the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action, as in the case of the getaway driver in *Davidson*, so long as the purpose of the tortious action was to advance the overall object of the conspiracy.

3. *Aiding-Abetting*

Our second line of cases focuses on the aiding-abetting theory of liability—specifically on what constitutes knowing substantial assistance or encouragement and on the extent to which an aider-abetter is liable for injuries caused by the principal tortfeasor. Calling attention again to the distinction between aiding-abetting and civil

conspiracy, we find both cases that are “pure” aiding-abetting and ones that courts could probably also have found to be civil conspiracies.

An example of the purer strain, *Rael v. Cadena*, 93 N.M. 684, 604 P.2d 822 (1979), involved a person who had given verbal encouragement (“Kill him!” and “Hit him more!”) to an assailant. The defendant had not physically assisted in the battery. The court explained that liability did *not* require a finding of action in concert, nor even that the injury had directly resulted from the encouragement. Instead, it found, citing *Restatement* § 876(b), that the fact of encouragement was enough to create joint liability for the battery. Mere presence at the scene, it noted, would not be sufficient for liability.

Suggestive words may also be enough to create joint liability when they plant the seeds of action and are spoken by a person in an apparent position of authority. In *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 522 S.W.2d 383 (1975), a security guard allegedly urged a younger motorist with a new car to “run [the car] back up here and see what it will do.” 522 S.W.2d at 387. The driver then struck the plaintiff while trying to avoid a pedestrian during his high-speed “test run.” The court held, relying on *Restatement* § 876(b), that a jury could have found the guard’s encouragement substantial because he had first proposed the trial drive and because his position of authority gave his suggestion extra weight. On the issue of extent of liability, the *Cobb* court found that the guard could have foreseen an appreciable risk of harm to others at the time of encouragement.

Vicarious liability can of course be based on acts of assistance as well as words of encouragement. And the contributing activity itself need not be so obviously nefarious as cheering a beating or prodding someone to drive recklessly. *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958), involved students throwing erasers at one another in a class-

room. One eraser struck the plaintiff, a nonparticipant in the “horse play”; her eye glasses shattered and she lost the use of an eye. The court found that a student who had only aided the throwers by retrieving and handing erasers to them was still liable for the injury, because he had substantially encouraged the wrongful activity that resulted in the injury. It did not matter that the defendant may not even have given any particular aid to the boy who threw the eraser that hit the plaintiff.

Rael, Cobb, and *Keel* dealt with direct encouragement by word or deed at the scene of the tort. But the aiding-abetting action may also be more distant in time and location and still be substantial enough to create liability. In *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (N.Y. Sup. Ct. 1959), the court held that a book company could be liable as a contributing tortfeasor because it had sold a model’s picture to a company with the knowledge the company would (as it did) alter and use the picture to defame the model. Relying partially on *Restatement* § 876(b), the court reasoned that acquisition of the photograph was an indispensable prerequisite to the libel. The sale, along with knowledge of the buyer’s intent to alter and publish the picture, could constitute “substantial assistance” for joint tort liability.

Russell, however, falls in the category of cases that might have been alternatively analyzed as civil conspiracies. Indeed, to the extent that the acts of aiding-abetting occur further from the actual scene of the tortious injury, the cases become more readily treatable as either conspiracies or substantial assistance cases. It is not always clear why courts take one theory over the other; sometimes they rely on both. As we said earlier, this may be permissible, but for reviewing purposes it is important to keep in mind the conceptual differences between the two torts, so that we can check that the necessary proof for one or both has been supplied, rather than simply a little of each.

American Family Mutual Insurance Co. v. Grim, 201 Kan. 340, 440 P.2d 621 (1968), is a good example of judicial merger of the theories. *Grim* involved the liability of a thirteen-year-old boy to an insurer of a church damaged by fire. The boy had broken into the church with his companions at night in search of soft drinks in the kitchen. Two other boys failed to extinguish torches they had used to light their way in the church attic. As a result, the church was damaged by an extensive fire. The boy whose liability was in question neither entered the attic nor even knew about the torches. He was not near the church when the fire appeared. Nevertheless, the court found the boy liable for the fire damage. In reaching this conclusion, the *Grim* court appeared to rely in part on a conspiracy-type analysis, reasoning that the boy was liable, despite his lack of involvement with the torches, because "the torches were used in the four boys' attempt to carry out their original unlawful plan." *Id.* at 625. But the *Grim* court also drew upon aiding-abetting concepts. It observed that the defendant was more than an innocent bystander after the boys had entered the church: "[T]here was evidence from which it could be inferred that [the boy] actively participated and lent encouragement and cooperation to the successful accomplishment of their over-all mission." *Id.* at 626. In sum, the *Grim* court was invoking both civil conspiracy and aiding-abetting theories on the ground there was both an agreement to break in to get soft drinks and substantial aid through actual participation in the break-in.

The facts of *Grim*—a break-in to pilfer soft drinks by four boys, two of whom jerry-rigged torches that caused substantial fire damage—also raise an interesting question of the permissible extent of liability: When is a defendant liable for injuries caused by the acts of the person assisted when the acts were not specifically contemplated by the defendant at the time he offered aid? The *Grim* court, drawing on the commentary to *Restatement*

§ 876(b), pointed out that the principle to apply in assigning liability under the aiding-abetting theory was: "[A] person who encourages another to commit a tortious act may also be responsible for other foreseeable acts done by such other person in connection with the intended act." *Id.* at 626. It then referred to a germane illustration carried forward in the present *Restatement*:

A and B conspire to burglarize C's safe. B, who is the active burglar, after entering the house and without A's knowledge of his intention to do so, burns the house in order to conceal the burglary. A is subject to liability to C, not only for the conversion of the contents of the safe but also for the destruction of the house.

Restatement § 876, comment d, illustration 10. The example, however, obviously involves a conspiracy, not mere aiding-abetting. Looking at the facts of its own case, the *Grim* court noted that "the need for adequate lighting could reasonably be anticipated [and] torches served that purpose." 440 P.2d at 626. Thus, the boy who had not used a torch, nor even expected one to be lighted, could be liable for the damage caused by the torches because their employment was foreseeable.¹²

Before leaving the aiding-abetting line of cases, it is helpful to review a case in which a court found that there was not enough evidence of assistance to support liability. *Duke v. Feldman*, 245 Md. 454, 226 A.2d 345 (1967), involved an allegation that a woman was liable for civil assault because she had aided and assisted her husband,

¹² The *Restatement* also gives an example of an unforeseeable action, for which a secondary defendant should not be liable:

A supplies B with wire cutters to enable B to enter the land of C to recapture chattels belonging to B, who, as A knows, is not privileged to do this. In the course of the trespass upon C's land, B intentionally sets fire to C's house. A is not liable for the destruction of the house.

Restatement § 876, comment d, illustration 11.

who had struck the plaintiff. To establish a claim against the wife, the plaintiff would have had to present "evidence that she assisted, supported, or supplemented her husband's action or that she instigated, advised, or encouraged the commission of the tort." *Id.* at 348 (citation omitted). Evidence that she was merely present at or took pleasure in the assault and battery would not be enough to create liability. The plaintiff's evidence of her involvement—consisting of the defendant's awareness of her husband's previous threats to plaintiff; her contemporaneous request to her husband to get their downpayment back from the plaintiff; her observation of the incident; and driving her husband away—was found insufficient to go to the jury. The *Duke* court observed that, based on this evidence, it would have been pure speculation to hold that the defendant had been aiding her husband. *Id.* at 348.

Summing up our review of the aiding-abetting cases, it is obvious that many variables enter into the equation on how much aid is "substantial aid." Generally, the cases support the five factors identified in the Restatement: the nature of the act encouraged; the amount [and kind] of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor; and the defendant's state of mind. See *Restatement* § 876(b), comment d.

For example, the *nature of the act* involved dictates what aid might matter, *i.e.*, be substantial. In *Rael*, the beating case, the defendant's war cry for more blood may well have contributed to the assaulter's hysteria, which was fueling his physical acts of violence. Obviously verbal support would have been of lesser import in *Russell*, the defamed model case, where the key assistance rendered was access to the photo.¹³

¹³ Under the "nature of the act" criterion, a court might also apply a proportionality test to particularly bad or opprobrious acts, *i.e.*, a defendant's responsibility for the same amount of

The amount [and kind] of assistance given the wrongdoer is also a significant factor in the cases. For example, the court in *Cobb* stressed the security guard's major part in prompting the tort—his suggestion sparked the negligent action. Similarly, the sale of the model's photo in *Russell* was integral to the wrongful alteration and advertisement. *Presence at the time of the tort*, the third factor, applies to all the aider-abettor cases discussed above except *Russell*. On the other hand, the court in *Duke* stressed that an assailant's wife was not jointly liable, despite her presence, because she offered no real assistance.

The fourth factor, the defendant's relation to the tortfeasor, was significant in *Cobb*, where the court emphasized that the guard's position of authority lent greater force to his power of suggestion. The *Keel* court also seemed to believe that the students' group action, their creation of a free-for-all, was both dangerous and ultimately injurious; thus, it found even a minimally-involved participant liable. This focus on group activity giving rise to joint liability for the wrongs of the group also appears in *Grim* (the church break-in and fire). Of course, the intimacy of the relationship between the wrongdoer and the defendant may also lead a court to be wary of inferring assistance warranting joint liability from supportive activities. Thus, in *Duke* the court seemed especially vigilant in evaluating evidence of the wife's assistance to her husband (who assaulted someone

assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences. This "hard look for assistance" may have occurred in *Keel*, where the court characterized the schoolroom chaos as something more pernicious than "horse play," and then found the defendant liable despite his relatively trivial role in the eraser throwing. The particularly offensive nature of an underlying offense might also factor in the fifth criterion, the "state of mind" of the defendant.

while she watched), so as not to infuse the normal activities of a spouse with the aura of a concerted tort.

Fifth, evidence as to the *state of mind* of the defendant may also be relevant to evaluating liability. In *Rael*, the defendant's abusive cheering of the battery showed he was one in spirit with the assaulter. But once again, the *Duke* court (wife on the scene of her husband's assault) refused to find evidence of liability, despite the fact that the wife had urged her husband to get the payment and had watched silently while the assault took place.

Finally, we would also rate a sixth factor—*duration of the assistance provided*—as important. The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly effects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind.

As for the second issue in aiding-abetting, the extent of liability, the test from *Cobb* and *Grim* appears to be that a person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it. While this language is slightly different from that found in civil conspiracy cases—where a conspirator is liable for acts pursuant to, in furtherance of, or within the scope of the conspiracy—we are not sure that it is a distinction that makes a practical difference. Foreseeability is surely an elusive concept and does not lend itself to abstract line-drawing. The court in *Grim*, citing the *Restatement*, apparently did not think conspiracy and aiding-abetting warranted different tests for extent of liability. We need not look further into this matter here, however, because we find below that Hamilton is liable for Halberstam's death under the language of both tests of extent of liability.

We note, finally, that the concept of tortious aiding-abetting has turned up frequently in the evaluation of

secondary liability for securities law violations, principally in the area of fraud. In the main, the securities cases provide support for the distinctions we have drawn between the elements of aiding-abetting and civil conspiracy.¹⁴ Some even rely on the *Restatement*, as we

¹⁴ The securities cases are also notable because they have flagged issues that generally have not yet been discussed but may well become important in future aiding-abetting cases involving physical harm or loss of property. First, several courts have struggled over the question of whether silence and inaction alone can qualify as "substantial assistance." It is easy to see why silence in the form of failing to disclose information pertinent to securities has provided the grist for claims in the legal mill. The range of judicial responses to claims based on silence and inaction in the face of knowledge or fraud extends from unqualified acceptance to outright rejection; in between are holdings that silence or inaction may create liability where there is a duty to disclose, or where it is proved that the silence was *consciously intended* to aid the securities violation. See generally *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 96-97 (5th Cir. 1975) (noting and discussing case holdings that do and do not accept silence and inaction as a basis for creating liability, proposing a blend, and emphasizing that assistance still must be shown to be "substantial"). The district court in our circuit has found that attorneys' silence breached a duty to inform their corporate client of certain adjusted financial information and lent an appearance of legitimacy to a merger—thereby providing substantial assistance to a merger violation. See *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682, 713 (D.D.C. 1978). We also note that in at least one nonsecurities case, a court has concluded that silence encouraged the commission of tortious acts. See *Schiller v. Strangis*, 540 F. Supp. 605, 623 (D. Mass. 1982) (finding that a policeman who jointly committed the tort of false imprisonment against the plaintiff, by his silence also encouraged his partner to attack the plaintiff physically).

The second issue concerns the scienter requirement in the third element of aiding-abetting—whether an aider-abettor must knowingly assist the underlying violation, or whether some degree of recklessness will suffice. The Supreme Court has so far reserved the question whether the element of "scienter" in Rule 10b-5 securities cases (whether or not

have, to help distinguish between the two concepts. See, e.g., *Pharo v. Smith*, 621 F.2d 656, 669 (5th Cir. 1980). They also underscore why line-drawing between the two theories matters. For example, the court in *Epprecht v. Delaware Valley Machinery, Inc.*, 407 F. Supp. 315, 320 (E.D. Pa. 1976), noted that liability may be based on a more attenuated relation with the principal violation in a conspiracy than in aiding-abetting. In a sense, the agreement in a conspiracy may substitute for the "substantiality" of an aider-abettor's assistance in carrying out the violation, thereby allowing greater temporal or physical distance between the conspirator and the wrongful act. The securities cases have also employed the *Restatement* list of evaluative factors on "substantial assistance." See, e.g., *Monsen v. Consolidated Dressed Beef Company*, 579 F.2d 793, 800 (3d Cir.), cert. denied, 439 U.S. 930 (1978); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 162-63 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974).¹⁵

based on aiding-abetting) may also include reckless behavior. See *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Our court has held that a "reckless" aider-abettor may under certain circumstances satisfy the Rule 10b-5 scienter requirement. See *Dirks v. SEC*, 681 F.2d 824, 844-45 (D.C. Cir.) (citing support from other circuits), cert. granted, 103 S. Ct. 371 (1982). But we have acknowledged that an "awareness of wrong-doing requirement" for an aider-abettor is designed to avoid subjecting innocent, incidental participants to harsh penalties or damages. See *Investors Research Corp. v. SEC*, 628 F.2d 168, 177-78 (D.C. Cir.) (stating negligence insufficient to establish liability for aiding-abetting a violation of a conflict of interest statute), cert. denied, 449 U.S. 919 (1980); *Dirks*, 681 F.2d at 845 n.28 (recognizing possible dangers and explaining that the circumstances of the case preclude them). See generally, *Ruder*, supra note 9, at 630-38 (recommending a knowledge requirement for an aider-abettor).

¹⁵ While *Monsen* and *Landy* explain that they rely on the *Restatement's* list of factors for guidance on whether assistance is "substantial," they only use four of the five criteria.

C. Applying the Two Theories in this Case

1. The Factual Inferences

Our first step in applying the law to the facts of this case is to review the district court's findings of fact under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a). This standard applies to the inferences drawn from findings of fact as well as to the findings themselves.¹⁶ The test places considerable limits on our discretion.

The basic facts in the case are undisputed and, as set out in Part I of the opinion, grounded almost entirely in Hamilton's testimony. It is the inferences the trial judge drew from those facts that are in contention on appeal. And it is the district court's inferences that are essential to establishing the elements of civil conspiracy and aiding-abetting in this case. First, the district court found that Hamilton "knew full well the purpose of [Welch's] evening forays and the means" he used to acquire their wealth. See District Court Opinion at 5, 6. Second, the district court inferred an agreement—that "[she] was a willing partner in his criminal activities." See *id.* Third, the district court pointed to various acts by Hamilton (e.g., typing transmittal letters for the ingot sales, handling the payments and accounts, maintaining all financial transactions solely in her name), see *id.* at 4, and concluded that they were performed knowingly to

For some unexplained reason, they do not mention the first factor noted in both *Restatement (First) of Torts* § 876 (1939) and *Restatement (Second) of Torts* § 876 (1979), the nature of the act encouraged. See *Monsen*, 579 F.2d at 800; *Landy*, 486 F.2d at 163.

¹⁶ See Fed. R. Civ. P. 52 advisory committee note:

[The clearly erroneous rule] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.

(Citations omitted.)

assist Welch in his illicit trade: "Disposing of the loot was the principal business in which Welch and Hamilton engaged while at home. Hamilton worked as secretary and recordkeeper of their transactions . . ." *Id.* at 5. *See also id.* at 6 (in its conclusions of law, the court noted Hamilton "knowingly and willingly assisted in Welch's burglary enterprise").

Based upon the record before us, we do not find these inferences to be impermissible. The facts lend them substantial support. The district court also emphasized that its conclusions were based in part on "the demeanor and behavior of Hamilton under oath." *Id.* at 5.

As to the inference of Hamilton's knowledge of Welch's criminal doings, it defies credulity that Hamilton did not know that something illegal was afoot. Welch's pattern of unaccompanied evening jaunts over five years, his boxes of booty, the smelting of gold and silver, the sudden influx of great wealth, the filtering of all transactions through Hamilton *except* payouts for goods, Hamilton's collusive and unsubstantiated treatment of income and deductions on her tax forms, even her protestations at trial that she knew absolutely nothing about Welch's wrongdoing—combine to make the district court's inference that she knew he was engaged in illegal activities acceptable, to say the least.

Similarly, the district court's finding of an agreement between Welch and Hamilton to execute a criminal enterprise involving stolen goods was not "clearly erroneous." As we discussed above, courts have to infer an agreement from indirect evidence in most civil conspiracy cases. The circumstances of the wrongdoing generally dictate what evidence is relevant or available in deciding whether an agreement exists. Factors like the relationship between the parties' acts, the time and place of their execution, and the duration of the joint activity influence the determination. In this case, Hamilton and Welch did

not commit burglaries together but their activities were symbiotic. They were pursuing the same object by different but related means. Their home became the storage and processing base for Welch's criminal activities; they thus performed some of their different parts of the illegal operation together at the same location. The long-running nature of the scheme is also crucial to the inference of agreement—Hamilton's knowledge and aid over five years makes some kind of accord extremely likely—perhaps only a tacit accord, but that is enough. Furthermore, while Hamilton's extensive participation in the profits of the illegal venture might not by itself prove an agreement, her unquestioning accession of wealth during this period is certainly consistent with such an agreement. Totalling all this evidence up, the district court's conclusion that Hamilton and Welch reached an understanding about their illegal enterprise withstands attack.

Finally, the district court's inference of *knowing* assistance also stands under the "clearly erroneous" test. Hamilton's invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary is substantiated by her own testimony. She performed these services in an unusual way under unusual circumstances for a long period of time and thereby helped launder the loot and divert attention from Welch. Given all this, we will not upset the court's inference that she knew she was assisting Welch's wrongful acts. As the Supreme Court noted, "[a] finding is 'clearly erroneous' [only] when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

2. *Civil Conspiracy*

The district court relied on the same three factual inferences to conclude that Hamilton was liable as a co-conspirator. District Court Opinion at 6. We agree. To

summarize our earlier discussion, in the District of Columbia a conspiracy requires: an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act. We have upheld the district court's finding that Hamilton and Welch agreed to undertake an illegal enterprise to acquire stolen property. The only remaining issue, then, is whether Welch's killing of Halberstam during a burglary was an overt act in furtherance of the agreement. We believe it was. As noted above, a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy. Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed Halberstam in his attempt to do so. The use of violence to escape apprehension was certainly not outside the scope of a conspiracy to obtain stolen goods through regular nighttime forays and then to dispose of them. *Cf. Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979) (driver of the getaway truck found liable as a coconspirator for an unplanned injury to a policeman inflicted by his inside partner, who was caught in the course of the burglary). In sum, the district court's findings that Hamilton agreed to participate in an unlawful course of action and that Welch's murder of Halberstam was a reasonably foreseeable consequence of the scheme are a sufficient basis for imposing tort liability on Hamilton according to the law on civil conspiracy.

3. *Aiding-Abetting*

The district court also concluded that Hamilton was liable as a "joint venturer." The elements to which the court referred—that Hamilton knew of Welch's illegal activity and assisted in it—suggest to us that the court basically relied on the theory that we have labeled aiding-

abetting. We have summarized its elements as follows: (1) the party the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation.

Welch fulfilled the first of these three elements by killing Halberstam during the course of a burglary. The district court's conclusions that Hamilton knew about and acted to support Welch's illicit enterprise establish that Hamilton had a general awareness of her role in a continuing criminal enterprise. The second element is thus satisfied. Finally, the district court also justifiably inferred that Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods. The only remaining issue, then, is whether her assistance was "substantial."

Applying the *Restatement's* five factors, we look first at the *nature of the act assisted*, here a long-running burglary enterprise, heavily dependent on aid in transforming large quantities of stolen goods into "legitimate" wealth. Hamilton's assistance was indisputably important to this laundering function; she gave not only her time and talents but also her name to accomplish that objective, through having checks made out to her and falsifying income tax returns. Although her own acts were neutral standing alone, they must be evaluated in the context of the enterprise they aided, *i.e.*, a five-year-long burglary campaign against private homes. Second, although the *amount of assistance* Hamilton gave Welch may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time to an essential part of the pattern.

Third, Hamilton was admittedly not *present at the time* of the murder or even at the time of any burglary. But as we noted above, the success of the tortious enterprise

clearly required expeditious and unsuspecting disposal of the goods, and Hamilton's role in that side of the business was substantial.

Fourth, the significance of Hamilton's *relation to the tortious actor* requires a careful balancing. We are understandably wary of finding a housemate civilly liable on the basis of normal spousal support activities. Even though Hamilton's assistance surely transcended performing household chores for Welch, we must be cautious not to overemphasize the relationship. Hence, we accord it a low priority in our calculus.

On the other hand, the fifth factor, the *defendant's state of mind* assumes a special importance in this case. If, as the district court found, Hamilton's assistance was knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act. Finally, the *duration of the assistance* has strongly influenced our weighing of Hamilton's assistance. It affected our sense of how Hamilton perceived her role and of the value of her assistance to Welch. In sum, we find that Hamilton's assistance was indeed substantial enough to justify liability on an aider-abettor theory.

On the scope of her liability, we agree with the district court that Hamilton's assistance to Welch's illegal enterprise should make her liable for Welch's killing of Halberstam. We noted above that under a civil conspiracy theory, it was within the scope and in furtherance of their agreement to conduct the illicit burglary enterprise. Similarly, under an aiding-abetting theory, it was a natural and foreseeable consequence of the activity Hamilton helped Welch to undertake. It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of

personal property crime at night—whether as a fence, burglar, or armed robber made no difference—because violence and killing is a foreseeable risk in any of these enterprises. *Cf. American Family Mutual Insurance Co. v. Grim*, 201 Kan. 340, 440 P.2d 621 (1968) (church break-in foreseeably leads to fire caused by unextinguished torches); *Restatement* § 876(b), comment d, illustration 10 (the action of a burglary conspirator who burns a home to conceal the crime is foreseeable).

III. CONCLUSION

We have lingered long on the elements of traditional tort theory that permit holding a nonparticipant in a burglary that led to murder civilly responsible for the economic consequences of so terrible an injury. Our effort to distinguish the elements and proof of civil conspiracy and aiding-abetting may appear formalistic, but it is motivated by our desire to move cautiously in cases like this one. Our ultimate purpose is to identify those characteristics that make the application of vicarious liability appropriate. We recognize that the elements of either theory are not perfect guides in this search. We expect that they will not be accepted as immutable components but that they will be adapted as new cases test their usefulness in evaluating vicarious liability.

Tort law is not, at this juncture, sufficiently well developed or refined to provide immediate answers to all the serious questions of legal responsibility and corrective justice. It has to be worked over to produce answers to questions raised by cases such as this. Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society. Yet the implications of tort law in this area as a supplement to the criminal justice process and possibly as a deterrent to criminal activity cannot be casually dismissed. We have seen the evolution of tort theory to meet twentieth century phenomena in areas such as product liability; there is no

reason to believe it cannot also be adapted to new uses in circumstances of the sort presented here. This case is obviously only a beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime. For present purposes, we are satisfied that the district court's factual findings and inferences fit into existing concepts of civil liability for concerted tortious actions through conspiracy and aiding-abetting. The judgment of the district court imposing civil liability on Hamilton for Halberstam's death is therefore

Affirmed.

violation of 1st A. rights
P. 9 n. 11 - proof under Burns of 1983 would be the same, citing
Harphy v. Greene

P. 15 - custom or policy as 1973 element of proof against Political

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subdividing the new trial based on enforcement of "no-street"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT
provisions of court's pretrial order

No. 81-1209

ALFRED MORRIS, APPELLANT

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 80-01307)

Argued May 3, 1982

Decided March 8, 1983

Peg Shaw, for appellant.

Donald A. Clower, for appellee.

Before: MACKINNON and WILKEY, Circuit Judges, and
HAROLD H. GREENE,* Judge, United States
District Court for the District of Columbia

* Sitting by designation pursuant to 28 U.S.C. § 292 (a).

Opinion for the Court filed by *Circuit Judge MacKinnon*.

MACKINNON, Circuit Judge: The district court entered judgment on a verdict in favor of defendant-appellee on plaintiff-appellant's complaint that he was discharged from employment in violation of the First Amendment. Appellant contends that the trial judge erred in several respects in ruling that certain of plaintiff's proffered proofs were inadmissible. Because we find merit in appellant's contentions that the district court erred in excluding (1) evidence of the employer's retaliatory actions against appellant prior to the discharge and (2) evidence of a pattern of retaliation against other employees, we reverse and remand the case for a new trial. Because we also have some concern that the state of the pleadings in the district court has permitted the parties to proceed without adequately establishing either the jurisdictional or the substantive basis of this action, we further instruct the trial court to grant leave to amend the pleadings in accordance with the following opinion.

I. BACKGROUND

Appellee Washington Metropolitan Area Transit Authority (the Authority), is an agency operated pursuant to a 1967 interstate compact between the District of Columbia and the states of Virginia and Maryland.¹ The Authority is responsible for the operation of the subway and bus systems in the Washington, D.C. metropolitan area. Appellant Morris was an officer employed by the Authority's Transit Police Force (the Force) from November 1974 until his discharge in October 1976.

The discharge led Morris to file the present action in District Court on May 23, 1980.² The complaint set forth

¹ See Pub. L. No. 89-774, 80 Stat. 1324 (1967).

² No explanation for the three-and-a-half year interval between the discharge and the filing of the complaint appears in the record.

three counts. Count 1, styled "Race Discrimination," alleged that "throughout Plaintiff's tenure on the WMATA police force black officers were treated differently respect to matters of promotion and discipline," Morris was one of the black officers who suffered "disproportionate discipline because of his race and that the Authority ultimately relied upon the pretext to fire him." Complaint ¶¶ 1-2, Count 2, styled "Retaliation," alleged that as a result of several complaints he made regarding the racial discrimination allegedly practiced on the Force, Morris "was singled out and fired . . . in retaliation for exercise of his rights." In these counts—the first based on racial discrimination, the second on *compensation* about such discrimination—Morris relied upon Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1978).

Count 3, with which we are primarily concerned in this appeal, was styled "First Amendment." This count alleged that "because plaintiff exercised his right to free speech, in criticizing the practice of race discrimination and disparate treatment, Defendant fired the plaintiff in violation of the rights guaranteed to him under the First Amendment" Complaint ¶ 11.

Plaintiff sought a variety of remedies for these alleged injuries. These included reinstatement with back pay, promotion to the pay grade he would have attained had he followed a normal course of advancement in the Force, \$500,000 in compensatory and punitive damages, and a declaration that his statutory and constitutional rights had been violated.

By order of November 3, 1980, the trial court granted Morris' demand for a jury trial as to the First Amendment

³ See 42 U.S.C. §§ 2000e-2(a) (1) (race discrimination), 2000e-3(a) (retaliation).

ment claim but denied it as to the Title VII counts.⁴ The jury trial commenced on November 13, 1980. On November 17, the jury returned a general verdict and answered interrogatories in favor of the defendant Authority. Morris' motion for a new trial was denied, and he appeals.

II. DISCUSSION

A. Preliminary Jurisdictional and Substantive Questions

Although appellant has limited his appeal to challenging three evidentiary rulings by the trial court, we find it necessary before considering these issues to raise *sua sponte* a question going to the substantive theory, and perhaps to the jurisdictional basis, of appellant's case. Such matters casting doubt upon the existence of federal subject matter jurisdiction are the proper subject of consideration on the court's own motion, as neither the consent or omission of the parties nor the acquiescence of the court can confer jurisdiction where none exists. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979); *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Louisville & N. Ry. v. Mottley*, 211 U.S. 149, 152 (1908). While our concern extends beyond the issue of jurisdiction to embrace the remedial theory under which Morris seeks relief, we deem it desirable and helpful, in order to assist both parties on remand in the instant case, to set forth the following observations on the nature of appellant's claim.⁵

⁴ No appeal is taken from the ruling on the Title VII counts. The Title VII claims were voluntarily dismissed with prejudice after the jury verdict on the First Amendment claim was announced.

⁵ Compare *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976) (per curiam) (remanding to permit amendment of jurisdictional allegations) with *Smith v. Spina*, 477 F.2d 1140 (3d Cir. 1973) (affirming despite erroneous substantive and jurisdictional theories upon which case was tried).

The action appears to have proceeded thus far assuming that the First Amendment provides a remedy for the conduct complained of here.⁶ Were serious doubts as to the correctness of that assumption, it is clear that Morris' exclusive remedy in retaliatory conduct alleged would be the retaliation of Title VII, 42 U.S.C. § 2000e-3(a) (*Brown v. General Services Administration*, 425 U.S. 820 (1976)). As we recently noted, *Brown* held Title VII to be "the exclusive source of judicial remedies for discrimination arising out of federal employment." *Boyd v. United States International Communications Agency*, 688 F.2d 981, 989 (D.C. Cir. 1982). Absent a showing that Title VII provides inadequate protection for his rights,⁷ see *id.*, a federal employee urging unlawful discrimination is confined to actions under that statute. Hence, a direct constitutional action by an employee against an agency of the United States or its instrumentalities would be foreclosed on the facts of the present case.

Title VII, however, does not similarly preempt the suit by state employees of alternative remedies the agencies or officials that employ them. *John R. Williams v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) summing that the sovereign immunity guaranteed Eleventh Amendment does not otherwise foreclose action of such character, a nonfederal public employee generally has resort to all other statutory and constitutional remedies available to redress deprivations of constitutional rights. Therefore, before we can probe the merits of appellant's arguments relating to the merits of his constitutionally-based claim, it must be determined whether appellant, in relying upon the First Amendment,

⁶ The parties' references in the district court proceeding to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 confirm this view.

⁷ See note 10 *infra*.

has stated an available ground for relief. That question, as the foregoing suggests, reduces to whether Morris was a federal or a nonfederal employee at the time he was dismissed by the Authority.

The Authority, as noted earlier, is the product of an interstate compact entered into by Virginia, Maryland, and the District of Columbia, and approved by the Congress as required by Art. I, § 3 of the Constitution. Pub. L. No. 89-477, 80 Stat. 1324 (1967). The fact that the requisite congressional approval of the Authority's creation and operation was secured does not, however, compel the conclusion that the Authority is an agency of the federal government. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 n.13 (1979). While we leave the question open for further development by the parties on remand, it would appear at first blush that the Authority is an instrumentality of "each of the signatory parties" to the interstate compact, Pub. L. No. 89-477, § 4, and thus a creature of the states and the District of Columbia, which acts "under color of state law," 42 U.S.C. § 1983 (Supp. IV 1980).⁸

Assuming that the Authority is properly considered to be a nonfederal employer, a further problem arises as to its precise status under state law. For if the Authority were to be held an *instrumentality*, rather than a "political subdivision," of the signatory states, its successful invocation of the Eleventh Amendment's immunization of the states from actions for damages in the federal courts would render this court without jurisdiction to hear the

⁸ Particularly instructive on this point, owing to its strongly similar factual situation, is *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In that case, the Court held that the defendant agency, which had been created by a congressionally approved compact between the states of California and Nevada, was nonetheless acting under state law. See also *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35 (2d Cir. 1977).

case, *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) and the judgment of the district court a nullity.

Because *Lake Country Estates* and the terms of Pub. L. No. 89-477, §§ 12(a), 16, 17, 18, and 80 strongly indicate that the Authority is either not cloaked with immunity enjoyed by Virginia and Maryland, or waived such immunity, see *Hodgers v. Tomberlin*, 521 F.2d 1280, 1283 (N.D. Ga. 1975), it would constitute judicial resources to review the merits of this case on present appeal. However, the issues have not been argued and we do not wish to foreclose further development of the jurisdictional issues by a ruling that would constitute the law of the case. We therefore leave this matter well for the district court to resolve on the basis of record before it and any further submissions by the parties. See *Van Ooteghem v. Gray*, 654 F.2d 304, 308 (5th Cir. 1981) (en banc), cert. denied, 455 U.S. 982 (1982). We note that the District of Columbia Court of Appeals recently held that the Authority is an agency of the states and the District of Columbia, and that each sovereign signatory to the compact and that compact waives the signatories' sovereign immunity from suit for proprietary functions. *Qasim v. WMATA*, No. 81-1011, slip op. at 3-4 (D.C. App. Jan. 26, 1983) (per curiam).

Assuming that Morris' claim is neither jurisdictionally barred by the Eleventh Amendment nor preempted by provisions of Title VII, one final preliminary issue remains concerning the nature of the remedy sought. Morris' free speech claim relies directly on the First Amendment as the source of the remedy sought. Yet although the courts have recognized the existence of a *Bivens* remedy for violations of the First Amendment,⁹ it is

⁹ See, e.g., *Dellums v. Powell*, 566 F.2d 167, 194-96 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978). See also *Ariz. v. Gentry*, 666 F.2d 1 (2d Cir. 1981); *Paton v. LaPrade*, 666 F.2d 862, 869-71 (3d Cir. 1975); *Yiamouyiannis v. Cher*, 666 F.2d 862, 869-71 (3d Cir. 1975); *Cher v. Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975), cert. denied, 439 U.S. 983 (1978); *Butler v. United States*, 367 F.2d 1035 (D. Hawaii 1973). A direct First Amendment

clear that a remedy based exclusively on that amendment can be had against anyone other than *federal* defendants acting pursuant to *federal* law. A direct constitutional remedy for the unlawful conduct of *state* actors, if any such remedy exists, would necessarily depend upon the Fourteenth Amendment, incorporating the substantive guarantees of the First, as its source.¹⁰ We

edy has been recognized in discharge cases brought by federal employees who do not enjoy the full protections of Title VII, *e.g.*, *Borrell v. United States Int'l. Comm. Agcy.*, 682 F.2d 981 (D.C. Cir. 1982); *Mazaleski v. Treusdel*, 562 F.2d 701 (D.C. Cir. 1977). See also *Tygett v. Barry*, 627 F.2d 1279 (D.C. Cir. 1980) (District of Columbia employee); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982) (transfer and discharge).

¹⁰ The availability of a *Bivens*-type Fourteenth Amendment remedy against nonfederal defendants is subject to serious question. The Supreme Court has explicitly reserved decision on the question. *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977); see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979). Moreover, in view of the Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), holding that political subdivisions of states are "persons" subject to suit under section 1983, it seems unlikely that the federal courts will feel free to imply a direct constitutional remedy in the face of the statutory remedy now available against nonfederal defendants. See *Carlson v. Green*, 446 U.S. 14, 52 & n.18 (1980) (*Rehnquist, J.*, dissenting); *Bivens v. Six Unknown Named Agents, supra*, 403 U.S. at 407-11 (*Harlan, J.*, concurring). The Courts of Appeals that have reached the issue since the *Monell* decision are unanimous in rejecting such a remedy. See *Rogin v. Bensalem Township*, 616 F.2d 680, 686 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981); *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980); *Owen v. City of Independence*, 589 F.2d 335 (8th Cir. 1978), *rev'd on other grounds*, 445 U.S. 622 (1980); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979) (*en banc*), *cert. denied*, 449 U.S. 1016 (1980); *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978). Even prior to *Monell*, courts denied the availability of such an implied remedy. See, *e.g.*, *Kostka v. Hogg*,

need not resolve this question, since the statutory remedy granted by 42 U.S.C. § 1983 does afford relief for the infringement of First Amendment rights alleged here. Accordingly, we treat Morris' claim on appeal as if were an action under section 1983.¹¹

We have noted only two significant questions arising out of the parties' failure to explore fully the nature of the claim involved in this appeal. There may well be other substantial differences between the action as has been perceived to this point and as we think should be viewed; we do not seek to identify or elaborate upon them. In addition to our disposition of the particular matters discussed below, therefore, we direct the district court on remand to permit the parties to amend their pleadings in light of our opinion¹² and to address any new legal issues thereby placed in dispute.

560 F.2d 37 (1st Cir. 1977). See also *Huemmer v. Mayor Ocean City*, 474 F. Supp. 704, 712-18 & nn. 8-15 (D. Md. 1979) (collecting authorities), *aff'd in part and rev'd in part*, 6 F.2d 371 (4th Cir. 1980); *Mahone v. Waddle*, 564 F.2d 10 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978); *Curran Portland Superintending School Comm.*, 435 F. Supp. 104 (D. Me. 1977). *Contra Daughy v. Arlington County*, 4 F. Supp. 307 (D.D.C. 1980).

¹¹ The proof required under either theory of liability would in the present case, be the same. See *Tarpley v. Greene*, 6 F.2d 1 (D.C. Cir. 1982); *Eklund v. Hardiman*, 526 F. Supp. 941 (N.D. Ill. 1981).

¹² See 28 U.S.C. § 1653 (1976) (permitting amendment jurisdictional allegations in either trial or appellate court). In light of the Supreme Court's ruling in *Maine v. Thibout*, 448 U.S. 1 (1980), it is possible that Morris' original allegation of federal question jurisdiction under 28 U.S.C. § 1331 is a sufficient allegation of jurisdiction to support his action when recast as a section 1983 claim, see *id.* at 8 n.6; *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-79 (1977) (*Hague v. CIO*, 307 U.S. 496, 529 (1939) (*Stone, J.*), particularly in view of the repeal of the amount-in-controversy requirement in section 1331, which is fully applicable to the

The parties were, and continue to be, in apparent agreement as to the elements of Morris' First Amendment claim. As set forth in the interrogatories pro-
pounded by the court to the jury, the action proceeded on the understanding that the burden was on plaintiff to prove

- (1) that he "had reason to believe there was racial discrimination on the WMATA [Authority's] police force";
- (2) that he "complained about racial discrimination at an appropriate time and place, in a manner [so as] not to interfere with his duties"; and
- (3) that the Authority did "unreasonably take action against him solely as a result of these complaints, and did not terminate him on the basis of deficient performance and insubordination."

Verdict Interrogatories, Nos. 1-3.

The jury found that Morris had proved the second element, *i.e.*, that his complaints had been made at a reasonable time and place and in a reasonable manner. However, it found that he had failed to prove either that his belief that discrimination was being practiced was reasonable (element 1) or that the Authority had discharged him "solely" because of his complaints (element 3).

There is no dispute as to the basis for or correctness of the jury's ruling on the second element.¹³ However, on appeal Morris urges that the trial court erroneously excluded evidence on both the reasonable belief issue and present case. *Eikenberry v. Callahan*, 653 F.2d 632 (D.C. Cir. 1981). Prudence, however, would dictate amendment of the jurisdictional allegations to include reference to 28 U.S.C. § 1343(3).

¹³ Counsel for the Authority stated at the close of the evidence that this element was "largely conceded." Tr. 219.

the retaliatory motive issue. We consider these in order.

1. *The reasonableness of Morris' belief*

The first element of Morris' claim identified district court, that the belief which gave rise to his complaints about the discrimination he perceived was in fact held and one which was "reasonable," is since a requirement that the plaintiff show his com- to be speech falling within the protection of the Amendment. Assuming the speech to be so pro- any restriction directed purely at suppressing it- municative content is impermissible save in th- extreme cases involving matters of "compelling" mental interest. *Widmar v. Vincent*, 454 U.S. (1981).

Morris sought to introduce testimony tending to show that there was a basis in fact for his belief that he was discriminated against by black officers. The Authority discriminated against black officers. The court, at the Authority's urging, excluded this testimony as irrelevant on the ground that the Authority's stipulation that the content of the complaints was not discriminatory falls within the categories of discrimination . . . falls within the categories of protected by the first amendment," Stipulation No. 2. to the fact that Morris in fact believed that he had discriminated against because of his race. Stipulation No. 2.

The transcript makes it apparent that the Authority stipulated to the protected status of Morris' complaints in order to prevent Morris from placing the details of race discrimination complaints he voiced before the jury. Transcript (Tr.) 22. In other words, the Authority made the tactical decision to admit that Morris was within his First Amendment rights,¹⁴ in order to

¹⁴ That admission was not gratuitous. Numerous cases recognize that the free speech rights of one occupying a position of public office may be significantly narrower than those of a private citizen.

the admission of evidence that might have made the jury more receptive to Morris' theory of the Authority's motivation in discharging him.

The trial court correctly held that the stipulations entered into by the parties eliminated the need to adduce evidence on the question whether Morris' speech was protected by the First Amendment. The purpose and effect of the stipulations was precisely to pretermitt any inquiry into whether Morris was justified in voicing his complaints. The defendant stipulated that the speech was "protected," Stipulation No. 1, and this was sufficient to dispose of the issue.¹⁵

held by other classes of employees. *See, e.g.,* Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981).

¹⁵ The following excerpts confirm the trial court's understanding of the effect of the stipulations:

[Counsel for defendant]: If we agree [*i.e.*, stipulate] then that what he said he had a right to say, that it is protected [*sic*], then I cannot understand why the content of such speech is relevant.

Tr. 41.

[Counsel for plaintiff]: What it is that in each incident [of complaint] I feel we have to do is give the underlying reasonableness of [Morris' complaint] when they have only stipulated to the fact that he believed it himself....

The Court: Well, I only thought it had to do with the actions of his *superiors* that were allegedly unreasonable.

Tr. 43-44 (emphasis added).

[Counsel for plaintiff]: If I can respectfully request the court for some guidance on just how I can go as to what he was saying was reasonable.

The Court: It is not what he thought was reasonable. It is what his superiors thought was unreasonable or he did that was unreasonable.

Tr. 46.

It is indeed difficult to reconcile the concessions by the Authority in the pretrial stage with its motion for a directed verdict, which relied in part on the claim that the "reasonable belief" element had not been proven. Tr. 219.

However, we are presented with the fact that the ultimately did submit to the jury an interrogatory inquiring whether Morris' belief was "reasonable," which jury answered in the negative. In our view, the interrogatory was superfluous in light of the stipulations, as a result the jury should not have reached the issue. Accordingly, the trial court should have instructed jury, in line with Stipulation No. 1, that Morris' speech was entitled to full First Amendment protection, that the only issues for the jury were the reasonable of the time, place and manner of complaint, and motivation for the firing.

Thus, although we reject appellant's challenge to trial court's ruling that the stipulation rendered irrelevant appellant's proffered evidence regarding the reasonableness of his belief, we note that the stipulations should have been sufficient and the issue should not have been presented to the jury. Because we hold that the must be remanded for a new trial for other reasons discussed below, we need not take the unusual step of versing on grounds not urged by appellant. At upon remand, however, the court should instruct the that the parties have stipulated that Morris' complaint to his superiors were speech protected by the First Amendment.¹⁶

This ruling does not bar the introduction of testimony as to the nature of those complaints. Such testimony is relevant, not to the "reasonableness" of Morris' belief.

¹⁶ The confusion concerning the stipulation as to Morris' belief can in some sense be laid at the feet of Morris himself who propounded the erroneous jury instructions to the contrary, and continues to view the issue of protectedness requiring proof. On the other hand, it was the Authority that originally sought and received the benefit of the stipulation with which the jury verdict conflicts, *i.e.*, the exclusion of testimony bearing on race discrimination. Both parties thus seeking tactical advantages, and neither will be prejudiced by our decision to give force to the stipulation.

but to the question of the Authority's motivation in firing him. *Regardless* of the reasonableness of his belief in their validity, if Morris can show that his complaints about discrimination caused his discharge, he will have carried his burden. To the extent that the content of those complaints, as distinct from the mere fact of their having been voiced, makes it more or less likely that Morris was discharged because he exercised his right to speak, that content will be relevant and admissible on the question of motivation.

2. *The motivation for the discharge*

Morris attempted to prove that the Authority's action was taken in retaliation for his speech by showing (1) that the Authority had a practice of retaliating against employees who complained about allegedly unlawful employment practices¹⁷ and (2) that the Authority's allegations of unsatisfactory job performance on appellant's part were in fact merely pretextual because those citations were themselves acts of retaliation. In short, Morris attempted to make out a prima facie case of retaliatory discharge and then to discredit the Authority's asserted nonretaliatory justification for the firing.

The trial court excluded evidence proffered by Morris on both questions. For the reasons set forth below, we find that these rulings were erroneous.

(a) *Pattern of retaliation*

Given a satisfactory demonstration—or, as here, a concession—that his speech was protected by the First Amendment, a prima facie case of unlawful discharge is made out if a plaintiff shows that the exercise of his right to speak and petition was a “substantial” or “motivating” factor in the decision to fire him. *Mt. Healthy*

¹⁷ Morris sought to adduce evidence of retaliation for complaints about sex discrimination and safety violations, as well as complaints like his own directed at race discrimination.

Board of Education v. Doyle, 429 U.S. 274, 287 (1977). In other words, the plaintiff must show that “but his speech he would not have been fired. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1981). In order to impose liability on a political subdivision distinct from its employees or officials, a section plaintiff must also show that the unlawful decision part of a “custom or policy” of unlawful firings on grounds. *Monell v. Department of Social Services*, 84 436 U.S. at 690-91 (1978). Once the plaintiff makes a prima facie case, the burden shifts to the employer show “by a preponderance of the evidence that it have reached the same decision” to discharge the plaintiff “even in the absence of the protected conduct.” *Healthy Board of Education v. Doyle*, *supra*, 429 U.S. 287. Plaintiff is then entitled to rebut this justification by proving it is merely pretextual.

In the present case the court instructed the jury in order to find for the plaintiff, they would have to determine that the Authority had discharged Morris “so because of his protected complaints. Jury Instruction 1.¹⁸ Even if the “sole factor” test were correct, we would be forced to agree with appellant that the testimony of other employees as to the Authority's treatment of complaints about employment conditions was improper and excluded.

¹⁸ Reliance on this legal standard can again be traced to the plaintiff's own requested instruction. See Plaintiff's Requested Jury Instruction No. 1 (jury must find “that the plain complaint was the sole cause of the termination”). For obvious reason that the instruction was his own, Morris not object to it at trial, nor does he challenge it on appeal. Instead, on the assumption that the “sole factor” standard was proper, he argues that the trial court erred in refusing to admit evidence tending to show a pattern or practice of discharges or other discipline in retaliation for complaints about the Authority's employment practices.

The question of the legitimacy of the employer's motivation in firing the employee—i.e., the question whether an improper motive was a “but for” cause of the discharge—is one upon which the past acts of the employer have some bearing. See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 320 (3d Cir. 1981); *Scaramuzzo v. Glenmore Distilleries, Inc.*, 501 F. Supp. 727, 733 n.7 (N.D. Ill. 1980), and cases cited. They also tend to show the existence of a “custom or policy” of unconstitutional acts, necessary to a finding of liability against the Authority. With regard to the latter, it bears noting that were evidence of other instances of retaliation inadmissible, it would be difficult to imagine many cases in which the “custom or policy” element could be proved save those in which the plaintiff could elicit testimony from the defendant’s own agents that such a custom exists.

This conclusion as to the relevance of past acts of retaliation is the same whether the legal standard on which the jury was charged was the “sole” factor or the “substantial or motivating” factor test.¹⁹ The legal standard for proof of causation is independent of the issue of whether evidence is *relevant* to causation. Here the plaintiff must show both that his dismissal was substantially caused by his speech and that this causation was not unique to his case but rather was customary in cases of complaint. The evidence plaintiff sought to adduce of past retaliation by the Authority for complaints from members of the Force was relevant to both requirements.

Morris attempted to introduce the testimony of three WMAA police officers, Bruce, Famoudou, and Nicola, in support of his allegation that the Authority engaged in the practice of retaliation against employees who complained about its employment practices. The district court excluded testimony by two of the three.

¹⁹ It will be open to the parties on remand to consider further whether the “sole factor” test to be applied is the proper legal standard in this case.

Officer Nicola, who is white, was employed by the Authority beginning in January 1977, and served as officers’ union shop steward. He was prepared to testify both as to management’s disparate treatment of him in retaliation for his union organizing activities²⁰ as to the disciplining of other officers in retaliation complaints about employment conditions, with which was familiar from his role as shop steward. The court took the view that Nicola’s testimony that he personally had been disciplined for complaining was relevant to Morris’ claim only insofar as it would relate to instances of retaliation for complaints about racial discrimination. Tr. 212-13B. Nicola would have testified only to events concerning complaints about sex discrimination and safety matters. Consequently, only one plaintiff’s witnesses, Officer Famoudou, was permitted to testify as to the Authority’s response to his complaint which concerned racial discrimination specifically. See Tr. 201, 203-04, 206.

We think this limitation on testimony was erroneous. Morris’ claim that his First Amendment rights were violated rested upon an allegation that the Authority retaliated against him for complaints that were protected speech and which were made in a reasonable time, place and manner. Although Morris’ complaints were directed at the Authority’s treatment of its black employees whereas the proffered testimony of Nicola concerned only sorts of employee complaints (made by Nicola himself and by other officers), we think that evidence showing that the employer followed a broad practice of retaliation and responded to any protected criticism with disciplinary action has some probative value on the issue.

²⁰ According to plaintiff’s counsel, Tr. 211-12, Nicola was prepared to testify that he had been denied permission to take the examination for promotion to sergeant for three successive years and had been verbally harassed as a result of union activities. Tr. 212.

of the employer's likely motivation here. Fed. R. Evid. 401. Evidence of other acts may be admitted to show motive, intent, preparation or plan. *Id.* 404(b). See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 310 (3d Cir. 1981). Under the circumstances of this case, the court should have admitted the evidence as relevant, and permitted the jury to consider whether the Authority's response to criticism on other subjects, if proved, was persuasive of its motivation in firing Morris for the reasons he claims.²¹

Morris also proffered the testimony of Officer Bruce, who was an employee at the time Morris was discharged, and who acted as a union shop steward during and after Morris' tenure on the Force.²² Unlike Nicola, Bruce was permitted to testify to instances in which he personally had been charged with violations of Force regulations.²³

²¹ As the trial court recognized elsewhere, even where evidence of other officers' experiences is relevant, the question remains whether a given witness is competent to testify as to those experiences. In particular, the requirement that the witness testify from personal knowledge may prevent a person such as Officer Nicola, a shop steward, from testifying to details of other employees' conduct and any resulting employer response. See Fed. R. Evid. 602. It is possible, however, that in the present case Officer Nicola could have testified to the circumstances of disciplinary or grievance procedures in which he personally participated.

²² There was some dispute as to whether Officer Bruce was acting as the union shop steward at the time of the firing. The Authority objected to Bruce's representation that he acted as steward on the ground that no union contract was signed until after Morris had been discharged. The trial court took the view that Bruce was in any event qualified to testify as to any assistance Bruce had given Morris in responding to the notice of removal, whether as a steward or simply as a friend.

²³ However, counsel for the plaintiff made no attempt to relate these charges to any protected First Amendment activity carried on by Officer Bruce. The essence of Bruce's testimony was simply that he had been given lighter punishments for his infractions of Force rules than had Morris for like vio-

However, Bruce was not allowed to testify regarding complaints made by other officers or the Authority's response to such complaints.

As with the proffered testimony of Officer Nicola, appellant's contention on appeal with respect to Officer Bruce is that he should have been permitted to testify as to discipline meted out to officers besides himself and appellant, and to the First Amendment activities of so disciplined. Appellant argues that Bruce, as one acted in the capacity of a shop steward handling employer grievances regularly, was qualified to testify as to the correlation, if any, between complaints and discipline, and that the trial court's confinement of Bruce's testimony to his own discipline was therefore error.

From the outset, counsel for plaintiff cast as or "reasonableness" the inquiry into the motivation in firing Morris. See, e.g., Tr. 46, 148. It appears that emphasis on the "reasonableness" of the firing, instead upon the probable *motivation* for the firing, ultimately, the court to confine the evidence to the facts surrounding the disciplining of Morris himself. Tr. 167. Although the court at one point appears to have recognized the discipline accorded other officers could have been relevant to the motivation element, Tr. 168, it is evident from the record that the court gave plaintiff's counsel clear impression that Bruce would not be permitted to testify to instances of discipline other than those directed against the witness *personally* or those with respect which he represented Morris before the Authority.

Again, although testimony generally must be based upon personal knowledge, the requisite knowledge concerning knowledge of the treatment accorded others. If a plaintiff

attempts. No attempt was made during examination to elicit any complaints Bruce had made in the course of his employment, or to bring out the fact that he made none if such was the case.

foundation was laid that Bruce had knowledge of other instances in which protected complaints were followed by official discipline—whether such knowledge came from first-hand observation, from records kept in the ordinary course of business, or from some other acceptable source—then he was competent to adduce that evidence. We conclude, therefore, that to the extent the testimony of Nicola and Bruce met these requirements, it should have been admitted.²⁴

(b) *Pretext*

The defense offered by the Authority to Morris' claim was in essence that its decision to discharge Morris was grounded on numerous violations of legitimate Force regulations. The Authority adverted to seventeen breaches of regulations during Morris' twenty-three month tenure,²⁵ culminating in a failure to report for duty when directly ordered to do so. Assistant Deputy Chief Stewart testified on behalf of the Authority that these recurrent violations constituted the true basis for Morris' dismissal. Tr. 363-69.

Morris sought to meet the Authority's defense by showing that the series of infractions allegedly leading to his firing was actually a series of unlawful retaliatory actions for various complaints he had voiced, in which the Authority had imposed disproportionate punishment for breaches of rules that normally went unpunished. In short, Morris sought to convince the jury that the Au-

²⁴ The trial court also excluded the testimony on the grounds of competence. For the reasons discussed above, and because the trial court did not permit a full exploration of this issue, we conclude that exclusion on this basis was also erroneous. We venture no guess as to whether a full exploration will produce a proper foundation for the admission of such evidence.

²⁵ Defendant's Trial Brief at 4. These included five instances of tardiness; four instances of lost or misplaced equipment (handcuffs, badge, ID card, and baton); four absences without leave; and several acts of insubordination, failure to follow regulations, or failure to obey an order.

thority's justification was purely pretextual and cated only to disguise its real retaliatory motive. *e.g.*, Tr. 232.

Morris attempted to substantiate his pretext with evidence that the instances of discipline led up to his discharge typically followed close on the heels of one of his complaints to the Authority. By showing that discipline for breaches of duty that would not be overlooked was regularly enforced only against those who voiced complaints about conditions of employment, Morris sought to convince the jury that the Authority was in fact unlawfully punishing not the breaches of the speech. This is a typical response, and the jury fully justified in not believing it. Many violators attempt to excuse their conduct by pointing to someone who went unpunished for "identical" conduct. The court simply decided it was not identical, and we agree.

The trial court permitted Morris to testify to instances in which he complained to Authority (in one instance, to a D.C. Council member who was the Authority board of directors) about disparate treatment accorded black and white officers on the Force. However, when counsel on direct examination attempted to elicit Morris' account of how each complaint was followed in short order by a finding that he had violated regulations—in each case a violation that Morris would usually have gone unpunished—the trial court sustained defense counsel's objections that the evidence was irrelevant. Because plaintiff had specified only the complaints in its trial brief, and not the consequent discipline, the court took the view that evidence of the discipline was beyond the scope of plaintiff's case and barred by the court's pretrial order.²⁶

²⁶ The pretrial order required the plaintiff to identify *inter alia*, "all facts which plaintiff intends to prove at trial to sustain each element of the claim(s) for relief" Trial Order at 2-3.

As it happened, the instances of discipline to which Morris sought to testify were precisely those upon which the Authority relied in contending that its discharge was justified. Both parties sought to put the identical instances of discipline into evidence: Morris, for the purpose of showing that punishment followed his complaints; and the Authority, for the purpose of showing it had legitimate grounds for its action. Morris' contention on appeal is that he should have been permitted, on direct examination, to testify to the discipline in a way that made evident the retaliatory motivation for the discipline.

We agree, for several reasons. First, it was evident from the plaintiff's pretrial statement *taken as a whole* that Morris would seek in testifying to elucidate the link between his complaints and the disciplinary measures. The pretrial statement includes the contention that "as a result of his lawful and justified complaints his superiors singled him out for harsh discipline not given others, and finally terminated him on the pretext of deficient performance and insubordination." Plaintiff's Pretrial Statement at II.A(4). It is apparent from this statement of the plaintiff's basic theory of the case that he sought to prove a connection between his speech and the Authority's asserted justification.

Second, it is evident from the case put on by the Authority that it could not have been surprised or otherwise prejudiced by the introduction of this testimony. Each instance of discipline about which Morris sought to testify was enumerated in the defendant's own trial brief. In fact, exposition of these instances constituted the bulk of the defense case.

Third, it is by now a recognized fact of employment discrimination litigation that showing of pretext can be part of the plaintiff's case in chief. The logical structure of a retaliation case, whether based upon Title VII or the First Amendment, consists in (1) the plaintiff prov-

ing his *prima facie* case, (2) the defendant providing legitimate reason for its action, and (3) the plaintiff having the opportunity to show that reason to be textual. However, the structure of the inquiry does bar a plaintiff from adducing evidence of pretext at the same time his evidence of unlawful motive is presented. In instances where enforcing a rigid separation between the motivation and pretext cases would prevent the plaintiff from presenting a fair portrayal of the events as unfolded, there is no reason to exclude evidence of pretext from plaintiff's case in chief, provided that the defendant has notice, as they did here, of plaintiff's ultimate intention to raise the pretext question.

We find under these circumstances that the exclusion of Morris' testimony regarding the discipline that he followed (at least chronologically) his complaints to his employer was an abuse of discretion. Although we endorse the trial court's issuance of a detailed pretrial order governing the conduct of the litigation, in this instance the enforcement of the terms of part of that order by means of excluding testimony central to the plaintiff's case was an unduly strict approach. See, e.g., *Schnitz v. Lockheed Aircraft Corp.*, 658 F.2d 835, 848 n.8 (Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is vacated. The case is remanded for further proceedings consistent with this opinion.

So ordered.

trate might consider: 1) that pending against the defendant at that time were both a felony and a misdemeanor charge (seriousness of the offense); 2) that the Government claims it had delayed its determination whether to prosecute so that it could more fully consider the defendant's proffered defense and the parties could conduct "plea negotiations" in connection therewith (facts and circumstances leading to dismissal); 3) that the "reprosecution was capable of being accomplished (and indeed was) within the 110 days then allotted by the Act (impact of reprosecution on the administration of the Act); and 4) that the defendant evidenced no concern about the delay in filing of more formal charges against him until well after the information was filed, and, of course, it goes without saying that the public is not the least bit interested in having their mail obstructed any more than it already is (impact of reprosecution on the administration of justice).

For the foregoing reasons the case is remanded to Magistrate Chrein for further proceedings not inconsistent with this opinion.

SO ORDERED.



Morton H. HALPERIN, et al., Plaintiffs,

v.

**Henry A. KISSINGER, et al.,
Defendants.**

Civ. A. No. 1187-73.

United States District Court,
District of Columbia.

July 1, 1982.

Former member of National Security Council staff and his family brought action against federal officials to recover damages

arising out of warrantless wiretap of plaintiffs' home. Following initial judgment for plaintiffs, 424 F.Supp. 838, the United States District Court for the District of Columbia, 434 F.Supp. 1193, ruled in favor of all defendants except three, and awarded nominal damages, and appeals were taken. The Court of Appeals, J. Skelly Wright, Chief Judge, 606 F.2d 1192, reversed and remanded, and certiorari was granted. The Supreme Court, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367, affirmed in part by an equally divided court. On remand, the District Court, John Lewis Smith, Jr., Chief Judge, held that: (1) plaintiffs' motion to disqualify government counsel would be denied; (2) plaintiffs would be allowed to amend their complaint to add allegation that they suffered emotional stress and mental anguish as a result of the surveillance of their home telephone; and (3) plaintiffs were not entitled to jury trial on the issues raised by their amended pleadings.

Order accordingly.

1. Attorney and Client ⇐32

In action brought by former member of National Security Council staff and his family against federal officials, to recover damages arising out of warrantless wiretap on plaintiffs' home telephone, plaintiffs' motion to disqualify government counsel on ground of irreconcilable conflicts in deposition testimony of individual defendants would be denied, since Department of Justice provided individual defendants with memorandum detailing proposed strategy, individual defendants then notified Department that they desired Department to continue its representation of them, depositions of individual defendants revealed no irreconcilable conflicts, and requiring defendants to hire new counsel would result in additional time and expense to both defendants and court.

2. Federal Courts ⇐952

In action brought by former member of National Security Council staff and his

family against federal officials to recover damages arising out of warrantless wiretap on plaintiffs' home telephone, plaintiffs would be permitted to amend their complaint to add an allegation that they suffered emotional distress and mental anguish as a result of the surveillance of their home telephone, since Court of Appeals, on appeal from district court's award of nominal damages for violation of plaintiffs' Fourth Amendment rights, had remanded, stating that district court's conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish. U.S.C.A.Const.Amend. 4.

3. Federal Civil Procedure ¶2046

Following remand of action brought by National Security Council staff member and his family against federal officials to recover damages arising out of warrantless wiretap of plaintiffs' home, plaintiffs were not entitled to jury trial on issues raised in a new damage claim raised by amended pleading, since the amendment did not open up a new defense or a new ground upon which to recover damages, but supported the original claim, and therefore, plaintiffs were not entitled to relief from their original waiver of jury trial on the other issues in the case.

Mark H. Lynch, Susan W. Shaffer, Alan B. Morrison, Washington, D. C., for plaintiffs.

Larry L. Gregg, Ann Robertson, Civil Div., Dept. of Justice, Washington, D. C., for defendants.

MEMORANDUM

JOHN LEWIS SMITH, Jr., Chief Judge.

Morton Halperin, his wife and two sons brought this action in 1973, seeking compensatory and punitive damages from defendants Kissinger, Nixon, Mitchell and Haldeman¹ under Title III of the Omnibus

Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976 & Supp. III 1979) and the Fourth Amendment. The suit arises from a twenty-one month warrantless wiretap on plaintiffs' home telephone from May 1969 until February 1971. On appeal of this Court's December 1976 ruling, 424 F.Supp. 838, the Court of Appeals for this Circuit affirmed this Court's conclusions on the immunity issue, but reversed on the applicability of Title III, the proper measure of damages, and defendant Kissinger's motion for summary judgment. The Court of Appeals also held that the warrant requirement for national security wiretaps was applicable to the surveillance in this case. *Halperin v. Kissinger*, 606 F.2d 1192, 1195 (D.C.Cir.1979). On June 22, 1981, the decision of the Court of Appeals with respect to Nixon, Mitchell and Kissinger was affirmed by an equally divided vote of the Supreme Court. The writ of certiorari with respect to Haldeman was dismissed as improvidently granted. *Kissinger v. Halperin*, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981). A petition for rehearing was denied.²

On remand before this Court, plaintiffs have filed three motions: a renewed motion to disqualify government counsel from representing all of the individual defendants, a motion to amend the complaint, and a motion requesting jury trial on all issues. Defendants have opposed all three motions, and have moved to strike plaintiffs' jury demand.

I. Plaintiffs' Renewed Motion to Disqualify Government Counsel

[1] Plaintiffs originally moved to disqualify government counsel over two years ago, while the case was pending before the Supreme Court. This Court denied that motion without prejudice. Plaintiffs renew their motion now, claiming that there are irreconcilable conflicts in the deposition testimony of the individual defendants, such that one counsel cannot properly represent

1. The dismissal of defendants Haig, Sullivan, Mardian, Erlichman, and the Chesapeake & Potomac Telephone Company by this Court was not challenged on appeal.

2. Justice Rehnquist did not participate. 453 U.S. 928, 102 S.Ct. 892, 69 L.Ed.2d 1024.

them. They also claim that the Department of Justice has advocated the institutional interests of the United States to the detriment of the individual defendants, and that the Department has not met its obligation to make the individual defendants aware of the conflicts involved. Lastly, plaintiffs argue that joint representation inhibits their ability to seek a settlement with one or more, but less than all, of the defendants. According to plaintiffs, the enhanced possibility of trial before this Court makes the above concerns even more pressing now than they may have been when the earlier motion was filed.

Under Disciplinary Rule 5-105(C) of the American Bar Association Code of Professional Responsibility (as amended, August 1978), a lawyer may represent multiple clients having differing interests "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each."³ The Supreme Court recently stated in a case involving the Sixth Amendment rights of criminal defendants that:

Defense counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his client knowingly accept such risk of conflict as may exist.... Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry. (footnotes omitted).

Cuyler v. Sullivan, 446 U.S. 335, 346-47, 100 S.Ct. 1708, 1717-18, 64 L.Ed.2d 333 (1980). The Court of Appeals for this Circuit has several times taken the position that in some instances the trial court has the obli-

gation to affirmatively determine that co-defendants have intelligently chosen to be represented by the same attorney. *E.g.*, *Lollar v. United States*, 376 F.2d 243, 245-46 (D.C.Cir.1967); *Campbell v. United States*, 352 F.2d 359, 360-61 (D.C.Cir.1965). The individual defendants in this case are neither uneducated nor unaware of their alternatives. Due to their potentially serious liability and the importance of the issues presented, however, the Court decided to accept the Department of Justice's offer to examine its privileged communications with the individual defendants *in camera*. The Court examined these communications solely to determine whether actual conflict exists and whether the individual defendants knowingly accepted the risks of any conflict.

After plaintiffs' second motion for disqualification was filed, the Department provided the individual defendants with a thirty-two page memorandum detailing the Department's proposed factual and legal strategy in this action, the potential advantages and disadvantages of Department representation, and the bases of the motion to disqualify. The individual defendants each notified the Department shortly afterwards that they had considered the materials provided and desired the Department to continue its representation of them in this action. Having examined these documents, the Court is satisfied that the consent of the individual defendants was given voluntarily and only after full disclosure and explanation of the issues involved. Plaintiffs' request to examine the individual letters of consent is denied.

Examination of the depositions of the individual defendants reveals no irreconcilable conflicts, as alleged by plaintiffs, but rather some vague and general statements of the individual defendants, from which plaintiffs themselves have drawn conflicting conclusions. As far as plaintiffs' tactical difficulties with settlements are concerned, this problem has been resolved by designating separate settlement counsel for each individual defendant.

3. The standards of the ABA Code of Professional Responsibility are made applicable to attorneys practicing before this Court by Rule

4-3(IV) of the Rules of this Court and by Rule X of the Rules of the District of Columbia Court of Appeals, as amended.

While it is not obvious that the Department will face no conflicts in its representation of the individual defendants in this case, see Disciplinary Rule 5-105(C), this Court is satisfied that no significant conflicts exist at present, and that defendants have made the choice to accept joint representation while in an adequate position to judge the possibility and effects of conflicts in the future. See *Westinghouse Electric Corp. v. Gulf Oil Corporation*, 588 F.2d 221, 229 (7th Cir. 1978). Moreover, weighing defendants' informed consent, the good faith representations of the Department, the benefits to defendants of a "united front" and Government experience in presenting their defense, *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1202 (4th Cir. 1978), against the time and expense both defendants and this Court would suffer if the individual defendants were required to hire new counsel nine years into suit, it is clear that plaintiffs' motion to disqualify should not be granted.

II. Plaintiffs' Motion to Amend the Complaint

[2] Due to plaintiffs reliance on a presumption of injury in requesting damages for violation of their Fourth Amendment rights, this Court concluded there was no demonstrable injury and awarded them only nominal damages. See *Halperin v. Kissinger*, 434 F.Supp. 1193, 1195 (D.D.C. 1977). The Court of Appeals remanded, stating, "We think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery." *Halperin v. Kissinger*, 606 F.2d at 1207-08 (D.C.Cir.1979). The Court of Appeals added in a footnote, "We see no reason why, on remand, they [plaintiffs] should not be permitted to amend their pleadings and attempt to demonstrate injury". *Id.* at 1207 n.103. Plaintiffs seek now to amend their complaint to add the allegation that they "suffered emotional distress and mental anguish as a result of the twenty-one month surveillance of their home telephone."

Defendants argue that the proposed amendment is not specific enough to satisfy Rule 9(g) of the Federal Rules of Civil Procedure. Although not a model of precision, plaintiffs' proposed amendment does adequately notify both defendants and the Court as to the nature of the claimed damages. *Schoen v. Washington Post*, 246 F.2d 670, 672 (D.C.Cir.1957). If defendants wish an itemization or estimation of damages at this stage, the proper course would be to move for a more definite statement. 2A J. Moore & J. D. Lucas, *Moore's Federal Practice* ¶ 9.08 (2d ed. 1982). Alternatively, the additional information may be sought through depositions or other discovery mechanisms. *E.g.*, *Great American Indemnity Co. v. Brown*, 307 F.2d 306, 308 (5th Cir. 1962); *Schoen v. Washington Post*, 246 F.2d at 672 n.4.

III. Plaintiffs' Motion for a Jury Trial

[3] Should the Court allow plaintiffs' amendment as to damages, plaintiffs demand a jury trial on that issue pursuant to Rule 38(b) of the Federal Rules of Civil Procedure. Simultaneously, plaintiffs have moved for relief from their waiver of jury trial on all other issues under Rule 39(b). They argue that it would be more expedient to try all issues together before a jury. The force of plaintiffs' argument hangs on their assumption that their demand for a jury trial on their new damage claim is timely under Rule 38(b). The Third Circuit decided that question in *Walton v. Eaton Corp.*, 563 F.2d 66 (3rd Cir. 1977) (en banc), holding that an added allegation that plaintiff suffered mental and emotional injury is not a "new issue" for purposes of Rule 38(b), provided the amended pleadings concern the same basic issues as the original ones. See *id.* at 72. Unlike the situation in *In Re Zweibon*, 565 F.2d 742 (D.C.Cir.1977), the amendment in this case does not open up a new defense or a new ground upon which to recover damages, but instead it supports the original claim.⁴ Although plaintiffs did

the Court later allowed on remand, in this case it was plaintiffs who did not specifically allege damages and who now seek to do so.

4. Whereas in *Zweibon* the amendment was necessary because the defendant did not expressly assert the defense of good faith, which

not specifically allege losses due to emotional distress and mental anguish in the original pleadings, the Court of Appeals indicated that recovery on those grounds was possible and might have been sought by plaintiffs. See *Halperin v. Kissinger*, 606 F.2d at 1207-08 & 1207 n.103. As a result, the Court finds there is no new issue in the amended pleadings here. Consequently, plaintiffs have no right to a jury trial under Rule 38(b).

Nor is there any basis for the Court to order a jury trial under Rule 39(b). Plaintiffs present no explanation for their failure to demand jury trial nine years ago when this suit was brought. See generally 5 J. Moore, J. D. Lucas & J. Wicker, *Moore's Federal Practice* ¶39.09 (2d ed. 1982). Moreover, it is obvious that a jury trial on all issues in this case would not promote expediency, but would present formidable obstacles in view of the complex factual and legal issues involved, as well as the pervasive publicity surrounding them. In these circumstances, there is substantial risk of prejudice, should relief from the waiver be granted and a jury trial allowed. Cf. *Plummer v. General Electric Co.*, 93 F.R.D. 311, 313 (E.D.Pa.1981). Accordingly, plaintiffs' motion for a jury trial on all issues on remand is denied.

Plaintiffs' motion to disqualify government counsel and plaintiffs' motion for a jury trial on all issues are denied. Plaintiffs' motion to amend the complaint is granted. Defendants' motion to strike plaintiffs' jury demand is granted. An order consistent with this opinion follows.

ORDER

Upon consideration of plaintiffs' renewed motion to disqualify government counsel from representation of defendants Kissinger, Nixon, Mitchell and Haldeman, plaintiffs' motion to amend the complaint, plaintiffs' motion for a jury trial on all issues, defendants' motion to strike plaintiffs' jury demand, all papers filed in support of and

in opposition thereto, the oral argument of counsel and the entire record, it is by the Court this 1st day of July 1982

ORDERED that plaintiffs' renewed motion to disqualify government counsel is denied, and it is further

ORDERED that plaintiffs' motion to amend the complaint is granted, and it is further

ORDERED that plaintiffs' complaint is amended as follows:

Page 12 is amended to include the following paragraph:

44. Plaintiffs suffered emotional distress and mental anguish as a result of the twenty-one month surveillance of their home telephone.

The prayer for relief is amended to include the following paragraph:

2a. Plaintiffs individually have judgment against each defendant (except defendant Webster) in compensatory and punitive damages in a sum deemed just for the emotional distress and mental anguish which plaintiffs suffered as a result of the twenty-one month surveillance of their home telephone.

and it is further

ORDERED that plaintiffs' motion for a jury trial on all issues is denied and defendants' motion to strike plaintiffs' jury demand is granted.



George E. DENT, Plaintiff,

v.

**UNITED STATES POSTAL SERVICE,
et al., Defendants.**

No. C-1-81-537.

United States District Court,
S. D. Ohio, W. D.

July 1, 1982.

Former employee brought an action against employer, union, and union officials. On the motion for summary judgment filed by union and union officials, the District Court, Spiegel, J., held that a material issue of fact existed as to whether union breached the duty of fair representation by not advising employee to file a new grievance over employer's decision denying reinstatement to employee, precluding summary judgment.

Motion denied.

1. Labor Relations ⇌ 416.1

Employee must exhaust available contractual grievance procedures prior to filing suit under grievance section of Labor Management Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. Labor Relations ⇌ 416.1

In appropriate circumstances an employee's ignorance of the nature and applicability of contractual grievance provisions can be excused when union fails accurately to advise employee of the proper procedures. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. Federal Civil Procedure ⇌ 2497

In former employee's action brought against union and union officials, material issue of fact existed as to whether union breached the duty of fair representation by not advising employee to file a new grievance over decision by employer denying reinstatement to employee, precluding summary judgment. Labor Management Rela-

tions Act, 1947, § 301, 29 U.S.C.A. § 185; Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

Wanda Perkins Coats, Cincinnati, Ohio, for plaintiff.

Gary Moore Eby, Elizabeth Gere Whitaker, Asst. U. S. Atty., Cincinnati, Ohio, for defendants.

SPiegel, District Judge.

This case is before the Court upon the motion for summary judgment filed by defendants American Postal Workers Union, John Panzeca, and Matthew L. Davis (doc. 16). Plaintiff has filed a "motion in opposition" (doc. 19) and an amended memorandum in opposition (doc. 20). The above named defendants have also filed a memorandum in reply (doc. 22).

Plaintiff is a former employee of the defendant United States Postal Service. While so employed, the defendant American Postal Workers Union acted as plaintiff's collective bargaining representative. Defendant Panzeca was, at all times relevant to the instant case, President of the Union Local. Defendant Davis, at all times relevant to the instant case, was a Union representative.

This lawsuit involves a series of events covering a period of one and a half years which culminated in plaintiff's discharge from the defendant Postal Service. For the purpose of clarity, we believe that a brief recitation of the operative facts is appropriate.

On January 3, 1978 the defendant Postal Service sent plaintiff a notice of proposed discharge. The Postal Service stated that the grounds for discharge were plaintiff's habitual absenteeism. Two weeks later, plaintiff received final notice of termination effective February 3, 1978.

On January 24, 1978, the Union steward filed a grievance on plaintiff's behalf. Before the grievance was presented for the final and binding arbitration set for October 10, 1978, the parties settled the grievance. Under the terms of the settlement,

*Respondent Cherry, for employees' constitutional rights, citing
Tardif
pp. 12-18 - in properly award of damages for inherent value
of educational rights*

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2171

CHARLES PHILLIPS, ET AL.

V.

DISTRICT OF COLUMBIA, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-01726)

Argued November 23, 1981

Decided January 11, 1983

Edward E. Schwab, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel and *Michael Zielinski*, Assistant Corporation Counsel were on the brief, for appellants. *David P. Sutton*, Assistant Corporation Counsel also entered an appearance for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Peter J. Nickles, with whom Ellen Bass, Joseph M. Fisher and Charles E.M. Kolb were on the brief, for appellees.

Before: MACKINNON and EDWARDS, *Circuit Judges*, and ROBB, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge EDWARDS*.

Separate statements filed by MACKINNON and EDWARDS, *Circuit Judges*.

EDWARDS, *Circuit Judge*: Appellees, inmates in the Lorton Maximum Security Facility ("Maximum"), brought this class action against the District of Columbia and several of its officials and employees, challenging the conditions of their confinement on a variety of constitutional, statutory and common law grounds. At trial, appellees presented evidence of their exposure to the danger of violent assault and sexual abuse—a situation allegedly caused or exacerbated by understaffing, deficient security equipment and procedures, inadequate systems for classifying and segregating prisoners, and a poorly designed and deteriorating physical plant. The case was submitted to a jury, which returned a verdict finding that the appellants had violated (a) the Eighth Amendment to the United States Constitution; (b) their duty of due care under the common law; and (c) their statutory duty to provide the inmates with "safekeeping, care, protection, [and] instruction."¹ The jury awarded to each member of the class of appellees damages in the amount of one dollar for each day of incarceration between July 4, 1976 and June 20, 1980. The trial judge supplemented that award with injunctive relief designed to ameliorate conditions in Maximum found to be viola-

¹ The last of the three violations was predicated upon D.C. CODE ANN. § 24-442 (1981). The trial judge inexplicably failed to charge the jury on two of the appellees' statutory causes of action. That omission has not, however, been challenged on appeal.

tive of applicable common law, statutory and constitutional standards.

Appellants attack the verdict and the awards of relief on several grounds.² We find merit in four of the allegations of error. First, the issuance of a protective order sharply curtailing the ability of appellants' counsel to discuss with their clients information obtained during discovery constituted, we conclude, an abuse of discretion. Second, the failure to instruct the jury that appellants could not be held liable on a *respondent superior* theory for constitutional torts committed by prison guards was error. Third, the instruction concerning the danger posed to weaker inmates by their proximity to a group of violence-prone prisoners was misleading. Fourth, the authorization to the jury to award appellees damages for the intrinsic value of their constitutional rights was inconsistent with controlling precedent.

I. THE PROTECTIVE ORDER

In the course of trial preparation, appellees expressed reluctance to comply with appellants' discovery requests, fearing that the information they provided would somehow be transmitted to correctional officers inside Maximum and thence to other prisoners. The net result, they pointed out, would be to expose them to serious risk of violent reprisal. Appellants responded that they needed

² In addition to the defects discussed below, appellants assigned as error (i) the District Court's decision not to enforce the notice requirement embodied in D.C. CODE ANN. § 12-309 (1981), (ii) the court's refusal, despite the supposed absence of proof of "actual physical injury," to direct a verdict for appellants on the local law claims, (iii) the court's supposed failure to instruct the jury that to state a claim under the Eighth Amendment one need prove more than negligence, and (iv) the court's refusal to allow the jury to consider the fact that the District of Columbia does not control its own budget and appropriations. All four arguments are frivolous.

the information in question in order to prepare their defense. The trial judge attempted to devise a compromise solution to this dilemma. She granted appellants' motion to compel discovery. But, soon thereafter, she also granted appellees' motion for a protective order, pursuant to Fed. R. Civ. P. 26(c), designed to prevent the facts revealed or allegations made in the course of discovery from entering the prison "grapevine."

Our first task is to determine just how much the District Court restricted the ability of appellants' counsel to make use of the information they obtained. Unfortunately, the order was inartfully drafted. Viewed in isolation, it might be interpreted as prescribing only the situs of communications between appellants and their attorneys.³ But such a reading would be inconsistent

³ The full text of the order reads:

Upon consideration of plaintiffs' motion for protective order and defendants' response thereto, it is by the Court this 7th day of May 1980,

ORDERED that plaintiffs' motion for protective order be and the same is hereby granted, and that counsel for defendants are directed that all deposition materials, including the reporter's tapes and notes, any prepared transcripts, as well as any documents or other tangible items produced by plaintiffs and other class members be placed under seal and not be publicly used or otherwise published by counsel for the defendants, defendants, or any of their agents, employees, officers or servants outside the offices of the District of Columbia Corporation Counsel until all unresolved questions as to their production and ultimate use at trial be brought before this Court for final resolution at the time of the pretrial conference. This protective order shall apply to the following areas of inquiry: class members' possession of weapons and contraband; their knowledge of other persons' participation in assaults or similar incidents; other persons' possession of weapons or contraband; identities and other information concerning correctional officers who conduct improper searches or otherwise violate regulations or reasonable procedures designed for the secu-

with the intent and understanding of the parties and, apparently, of the trial judge. Appellees certainly sought an order "prohibit[ing] defendants' counsel from in any way making known to the defendants information provided by plaintiff class members in depositions or other discovery proceedings."⁴ Furthermore, the District Court explicitly stated that "plaintiffs' motion for protective order be and the same is hereby granted"⁵ and gave no indication that the terms of the decree were any different from those requested; this strongly suggests that the order should be construed to comport with appellees' original plea. Any qualms we might have concerning such a construction are removed by the fact that the subsequent conduct of appellants, appellees and the trial judge makes plain that they all assumed that no discussion was permitted between appellants and their counsel concerning the fruits of discovery. The issue presented for review, therefore, is the validity, on the

rity or safety of the residents. Furthermore, defendants are barred from using the testimony and documents obtained in any disciplinary, administrative, or other judicial proceeding involving any plaintiff or other class member.

Appendix ("App.") 84-85.

Appellees argue, with some force, that the ban on disclosures "by counsel for the defendants, defendants, or any of their agents" presumes rather than forbids communication between appellants and their lawyers and that the order merely requires that all conversations take place in "the offices of the District of Columbia Corporation Counsel." Nevertheless, given the undisputed facts of this case, *see* text at notes 4-5 *infra*, we are constrained to construe this language as intending to restrict further dissemination of any information already in the hands of defendants. Otherwise, we must conclude that the language simply reflects clumsy draftsmanship.

⁴ Motion for Protective Order, App. 75.

⁵ *See* note 3 *supra*.

facts of this case, of a protective order forbidding not only all dissemination to the public but all disclosure by counsel to their clients of information of specified sorts obtained during discovery.

In general, district courts have broad authority, under FED. R. CIV. P. 26, to distinguish reasonable and productive uses of the discovery procedures from abusive invocations of those procedures and to design protective orders to curtail the latter. *See Keyes v. Lenoir Rhyme College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). Appellate courts will overturn such judgments only upon a clear showing of an abuse of discretion. *Gabella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

Protective orders that restrict dissemination to the public of discovered information, however, stand on a somewhat unusual footing. The resultant infringement of interests protected by the First Amendment, we have held, requires a district court to be careful to grant such an order only when essential to shield a party from significant harm or to protect an important public interest. *In re Halkin*, 598 F.2d 176, 190-91 (D.C. Cir. 1979). Moreover, the court must tailor the restraint so as to sweep no more broadly than necessary. *Id.* at 191.

District courts must be equally chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information. It is, of course, well established that due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In many situations, the right to a hearing would be meaningless were the litigant

forbidden to obtain the assistance of a lawyer in determining the nature of the claims against him, the opposing arguments available to him, and the manner in which his case would be most effectively presented. *See Note, The Indigent's Right to Counsel In Civil Cases*, 76 YALE L.J. 545, 548-49 (1967). The foregoing considerations have prompted the Supreme Court to observe, in dictum:

If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added). Relying on similar arguments, some lower courts have expressly held that a civil litigant has a constitutional right to the assistance of hired counsel. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Roberts v. Anderson*, 66 F.2d 874, 876 (10th Cir. 1933); *Ree Investigative and Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971) (dicta).

In order to decide the case before us, we need not elevate to constitutional status the right to the aid of counsel. It is sufficient for present purposes to recognize simply that every litigant has a powerful interest in being able to retain and consult freely with an attorney. Insofar as the fair administration of justice requires that all parties to a controversy be fully and equally informed of their entitlements, the public has a similarly important interest in preserving the ability of each disputant to confer with his lawyer. This public interest is reinforced by the value we place on the right of every litigant to participate in the process whereby justice is done—to understand and become involved in the proceed-

ing, not to be compelled passively to await its outcome.⁶ Regardless of whether these considerations are deemed to be inherent in the principle of due process, they must be accorded considerable weight by a trial judge when considering the propriety of issuing a protective order under Fed. R. Civ. P. 26(c).⁷

We conclude, therefore, that the criteria set forth in our decision in *In re Halkin* as prerequisites for the issuance of an order restricting public dissemination of information obtained through discovery are equally applicable to the issuance of an order forbidding counsel to reveal such information to his client:

The court must . . . evaluate such a restriction on three criteria: the harm posed by [disclosure] must

⁶ See Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126 (1977) ; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-03 (1978).

⁷ Our insistence that the trial judge recognize the importance of these factors is not undermined by the fact that his discretionary control over the discovery process includes the power to cut off inquiry altogether in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). Merely because the government (here acting through the judiciary) may withhold a benefit or "privilege" entirely does not mean that it is free to condition the receipt of such an entitlement on the recipient's renunciation of a constitutional right. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (state may not "condition the availability of [unemployment] benefits upon [the recipient's] willingness to violate a cardinal principle of his religious faith"); *Arnett v. Kennedy*, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting) (observing that "a majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on statutory limitation of procedural due process protections . . ."); TRIBE, *supra* note 6, at 510. We believe that the force in the present context of the foregoing principle would not be diminished even if a litigant's interest in consulting freely with his lawyer were not held to be constitutionally protected.

be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on [attorney-client relations].

598 F.2d at 191 (footnotes omitted).

We do not intend these guidelines to be prohibitive in practice. Indeed, when serious harm to a party or to the community cannot be avoided without either forbidding discovery altogether or curtailing communication between one of the litigants and his attorney regarding discovered materials, the court should issue such a protective order.⁸ But, to reiterate, the court must be confident that the potential injury is substantial and cannot be prevented through the use of any device less restrictive of a party's access to his lawyer.

Applying the foregoing standards to the instant case,⁹ we are compelled to conclude that the District Court abused its discretion in issuing the protective order re-

⁸ Such orders have frequently been issued, under Fed. R. CIV. P. 26(c) (7), to prevent disclosure to a party's business competitor(s) of "trade secret[s] or other confidential research, development, or commercial information." See, e.g., *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977) ; *Maritime Cinema Serv. Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y. 1973).

⁹ Our analysis of the application of the legal standards proceeds on the assumption that the only significant effect of the protective order was to forbid disclosure of the discovered information to appellants by their counsel. See text at notes 4-5 *supra*. Though the order by its terms also proscribed dissemination of the information to the public, see note 3 *supra*, appellants have not contended that they had any interest in publicizing the facts revealed and allegations made by appellees. Accordingly, the test set forth in *Halkin* controls this case because the order restricted attorney-client consultation, not because it intruded upon interests shielded by the First Amendment.

quested by appellees. The first of the three *Hallin* criteria does seem to have been satisfied. Affidavits submitted by appellees, detailing the danger of retaliation to which they would be exposed if persons inside the prison learned of allegations they made in the course of discovery, were more than sufficient to show that "substantial and serious harm" might well have resulted from dissemination of the information in question.¹⁰ The second requirement also seems to have been satisfied. The order was limited to designated "areas of inquiry,"¹¹ and information or charges of the specific sorts identified likely would have provoked retribution if communicated to the incriminated parties. The third criterion, however, was not satisfied. The District Court could have formulated a decree that would have been equally effectual in preventing retaliation and would not have inhibited consultation between appellants and their attorneys. The possibility that springs most readily to mind is a ban on communication (concerning matters learned through discovery) between the defendant prison officials and any of the prison guards or inmates. Under these circumstances, it was error to issue the order.

Appellants insist that, having found an abuse of discretion in the issuance of the protective order, we need not determine whether they suffered any demonstrable prejudice thereby. An infringement of the right to consult with one's attorney, they claim, is so serious as to be grounds for reversal even in the absence of a showing of harm. We need not address this argument because the injury to appellants in the instant case was palpable. They were prevented, not only from conferring with their lawyers regarding how best to respond to appellees' allegations but even from checking their files for information relevant to the charges made. Such restrictions

¹⁰ See Affidavit of Jeffrey Jackson, ¶ 10, App. 173; Affidavit of Deborah Jones, ¶ 12, App. 178.

¹¹ See note 3 *supra*.

certainly impaired their ability to prepare their case. We conclude, therefore, that the trial was tainted by the overly broad order and that, consequently, the verdict must be vacated.

II. THE ABSENCE OF A RESPONDEAT SUPERIOR INSTRUCTION

It is now established that local governing bodies may not be held liable, solely on the basis of a *respondeat superior* theory, for constitutional torts committed by their employees.¹² Some of the testimony presented at trial and a portion of appellees' counsel's closing argument might have been interpreted by the jury as implying that the District of Columbia was legally responsible for the consequences of unauthorized actions of individual prison guards.¹³ The trial judge did not give the jury an instruction foreclosing such an interpretation. That omission was error.

III. THE INSTRUCTION ON THE INTERMINGLING OF INMATES

In the course of her instructions regarding whether the level of violence at Maximum violated the Eighth Amendment, the trial judge told the jury that they might consider the adequacy of the prison's system for classifying and segregating prisoners and, more specifically, the fact that "inmates who have participated in or have the potential for committing violence are placed in separate tiers of the same cellblock with prisoners who have been

¹² See *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (suit brought under 42 U.S.C. § 1983 (Supp. IV 1980)); *Tarpley v. Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982) (suit brought directly under the Constitution).

¹³ See, e.g., Transcript ("Tr.") 747, 749, 751-52, 757-58, 760, 761 (elicitation of admissions of "procedural violations" by guards); Tr. 1143 (counsel's ambiguous argument concerning the legal significance of such violations).

attacked or are particularly vulnerable to attack." App. 140. This instruction was factually accurate but somewhat misleading, insofar as it implied that the proximity of the two groups endangered the weaker prisoners, while the evidence supporting that inference was meager.¹⁴

The prejudice suffered by appellants as a result of either this or the foregoing mistake on the part of the trial judge does not appear to have been substantial. Were these the only flaws in the proceedings below, we might be inclined to discount them as harmless error. But, because we have concluded that the abuse of discretion in issuing the protective order dooms the verdict, we need not speculate regarding the actual impact of the flaws in the instructions relating to permissible theories of liability and the intermingling of prisoners. However, we of course expect that these mistakes will be avoided in the new trial.

IV. DAMAGE AWARDS FOR THE IMPOSITION OF "CRUEL AND UNUSUAL PUNISHMENT"

The fourth and final defect in the proceedings below relates to a portion of the charge to the jury that reads as follows:

If your verdict is for the plaintiffs, you must then proceed to determine the amount of damages.

Damages or injury must be proved by the persons who seek to be compensated. Actual damages are imposed to compensate the plaintiffs for injuries they have actually sustained. You are not to award damages for any injuries the plaintiffs may have suffered unless plaintiffs establish by a preponderance of the

¹⁴ Indeed, appellees never disputed evidence presented at trial by appellants indicating that the gates between the two tiers were never opened. Tr. 633.

evidence in the case that the injuries were proximately caused by the defendants' wrongful conduct.

....

It is not necessary that actual physical injury be shown in order for plaintiffs to recover in this action. If you find that plaintiffs were caused to suffer discomfort, mental or emotional distress or any other actual damage, as a result of defendants' wrongful acts or omissions, they are entitled to recover damages to compensate them for those injuries.

If you find that defendant [sic] deprived plaintiffs of their constitutional rights, you may award plaintiffs damages for that deprivation. There is no precise formula for calculating these damages. Nevertheless, although the value of the plaintiffs' constitutional rights is difficult to assess, it must be considered. Thus, if you find that defendants violated plaintiffs' constitutional rights, you should arrive at a damage figure based upon consideration of equity, reason and pragmatism.

App. 145-47. This and other language in the trial judge's charge makes it reasonably clear that the jury was not to award anything more than nominal damages to the plaintiffs in the absence of a showing of some actual injury. But the instruction does seem to leave open another possibility: if the jury concluded the plaintiffs had suffered actual harm, they might award damages to compensate them for (i) their physical injuries; (ii) their mental distress; and (iii) the intrinsic value of their constitutional rights—evaluated "upon consideration of equity, reason and pragmatism."

The legal standards against which such a charge must be measured are not altogether clear. Upon examination of the relevant case law, however, we are compelled to conclude that the permission granted the jury to compensate appellees for the value of their violated rights constituted reversible error.

Analysis of the applicable doctrine must begin with the opinion in *Carey v. Piphus*, 435 U.S. 247 (1978). The Supreme Court there held that

the basic purpose of a [42 U.S.C.] § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

Id. at 254. The Court's opinion does include language suggesting that portions of its rulings are applicable only to damage awards for violations of procedural due process. *Id.* at 258-59, 264-65. But, fairly read, those comments relate only to the identification and measurement of the particular interests shielded by different constitutional provisions. As the language quoted above indicates, the Court meant to extend the basic "compensation principle" to *all* constitutional rights, substantive as well as procedural. It is disingenuous to suggest otherwise.¹⁵ It is equally apparent that the Court intended to require, not just that plaintiffs demonstrate actual injury before they secure more than a nominal recovery, but that damage awards be *limited* to sums necessary to compensate plaintiffs for actual harm.¹⁶

¹⁵ For opinions seeking to explain away *Carey*'s adoption of the compensation principle, see *Halperin v. Kissinger*, 606 F.2d 1192, 1207 nn. 100-01 (D.C. Cir. 1979), *aff'd per curiam by an equally divided Court*, in part, *cert. dismissed*, in part, 452 U.S. 713 (1981); *Konezak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979) (alternative holding), *cert. denied*, 444 U.S. 1016 (1980).

¹⁶ Similar views are adopted in *Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979); *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 537 (S.D. Iowa 1978), *rev'd in part on other grounds and remanded*, 605 F.2d 1058 (8th Cir. 1979).

By its terms, *Carey* explicitly governs only suits brought under 42 U.S.C. § 1983. But it would be difficult to defend a refusal to extend the holding of the case to suits brought directly under the Constitution—so-called *Bivens* actions.¹⁷ The bodies of law relating to the two forms of litigation have been assimilated in most other respects.¹⁸ Although the Court in *Carey* justified its decision partly on the basis of the legislative history of section 1983,¹⁹ which of course is not applicable to suits brought under the Constitution, other aspects of its rationale are equally pertinent to *Bivens* actions. Certainly the general assertion that constitutional rights protect particular interests and are to be valued solely by reference to those interests is transferrable to the *Bivens* context. And the problems associated with leaving juries free to guess at the "inherent value" of constitutional rights are equally germane to the two kinds of suits.²⁰

How, then, do these principles bear upon a suit challenging prison conditions on the basis of the Eighth Amendment? The Supreme Court instructs us that "the

¹⁷ The reference is to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Jurisdiction in such suits is predicated on 28 U.S.C. § 1331 (Supp. IV 1980).

¹⁸ See, e.g., *Butz v. Economou*, 438 U.S. 478, 498-504 (1978) (same "qualified immunity" rules); *Tarpley v. Greene*, 684 F.2d at 9-11 (same rules concerning theories of liability to which municipalities are exposed); *Paton v. LaPrade*, 524 F.2d 862, 871 (3d Cir. 1975) (same standards for determining compensable injuries).

¹⁹ 435 U.S. at 255-57.

²⁰ Cf. Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966 (1980), which argues vigorously for delimitation of the *Carey* principle but acknowledges that valuation of constitutional rights on any other basis would be difficult and that any judicial constraints on the measurement process would be, at best, problematic, *id.* at 988-90.

rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question" *Carey v. Phipps*, 435 U.S. at 259. In applying that injunction to suits like the one at bar, we must remember that we are dealing with prisoners, who in most instances are persons who have been convicted of committing serious crimes. As the Supreme Court has observed in a different context:

[W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. . . .

But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Bell v. Wolfsh, 441 U.S. 520, 545-46 (1979) (citations omitted) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

With these admonitions in mind, it is fair to conclude that the interests of prisoners shielded by the ban on "cruel and unusual punishment" correspond reasonably closely to the interests protected by analogous common-law tort rules.²¹ See *Carey v. Phipps*, 435 U.S. at 257-58. Specifically, it would appear that prisoners may recover for the infringement of three interests: (i) bodily in-

²¹ Note that the analogies drawn are not limited to measures of recovery associated with the tort of false imprisonment but extend to damage theories relating to the more general categories of intentional and negligent harm. Cf. *Clappier v. Flynn*, 605 F.2d at 529 ("The interest protected by the common law of negligence . . . parallels closely the interest protected by the Eighth Amendment . . .").

tegrity; (ii) peace of mind;²² and (iii) earning capacity.²³ In other words, plaintiffs are entitled to compensation for any physical injuries, pain and suffering, emotional distress,²⁴ and impairment of their prospects for future employment proximately caused by the defendants' unconstitutional conduct.

In considering these questions, it is well to keep in mind that the Supreme Court has often observed that constitutional tort actions—both of the section 1983 and of the *Bivens* variety—have an important deterrent function. See *Carlson v. Green*, 446 U.S. 14, 21, 24-25 (1980); *Butz v. Economou*, 438 U.S. 478, 505 (1978).²⁵

²² See RESTATEMENT (SECOND) OF TORTS §§ 46, 905 (b) (1977).

In *Carey*, the Supreme Court went out of its way to sanction the award of compensation for emotional harm—on the condition that the plaintiff provides evidence thereof. 435 U.S. at 263-64 & n.20.

²³ See RESTATEMENT (SECOND) OF TORTS § 906 (b) (1977).

While it must be acknowledged that there is no constitutional right to rehabilitation, *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981), it would seem equally clear that prisoners have a right not to be subjected to conditions (apart from the reasonable incidents of incarceration itself) that reduce their ability to earn a living and otherwise to conduct themselves in the world following their release.

²⁴ It may well be possible, in an appropriate case, to infer the infliction of emotional distress from the circumstances of the violation. See *Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974). While the Court in *Carey* seemed to frown on such a mode of proof in the context of procedural due process, 435 U.S. at 263-64 & n.20, such inferences likely would be much more reliable when the plaintiff has been subjected to "cruel and unusual punishment."

²⁵ See also Note, *Damage Awards for Constitutional Torts*, *supra* note 20, at 980-81. The obstacles faced by a victim of unconstitutional conduct to securing judgment in his favor, as well as structural problems in the impact of such decisions,

While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate. As this court has said before:

[I]n cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts."

Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (footnotes omitted) (quoting *Tatum v. Morton*, 562 F.2d 1279, 1282 (opinion for the court), 1287 (Wilkey, J., concurring) (D.C. Cir. 1977)), *aff'd per curiam by an equally divided Court, in part, cert. dismissed, in part*, 452 U.S. 713 (1981).

Unfortunately, the jury in the instant action was permitted to award more than liberal compensation for actual harm. They were also instructed to determine—and to award damages for—the intrinsic value of the plaintiffs' Eighth Amendment rights. The likelihood that they obeyed that instruction is sufficiently great to necessitate a new trial.

may well make damage awards a less than ideal device for deterring future violations. See Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 48-52 (1980). But the suggestion that, for deterrent purposes, we abandon damage awards entirely in favor of equitable relief, *id.*, ignores the utility of discouraging officials other than those involved in the case at bar from engaging in unconstitutional behavior.

V. CONCLUSION

For the foregoing reasons, the judgment is reversed and the awards of damages and equitable relief are vacated.²⁶ The case is remanded for a new trial in accordance with this opinion.

Separate statements will be filed by Circuit Judge MACKINNON and Circuit Judge EDWARDS sometime shortly after the issuance of the foregoing opinion for the court.

²⁶ The District Court, on remand, will of course be free to consider the propriety of granting equitable relief, pursuant to FED. R. CIV. P. 65, pending the outcome of the new trial, that incorporates the terms of the original equitable decree.

*superior & thereby
To establish liability under 1983 official policy must be
moving over at the constitutional violation*

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1850

GREEN MILLER, JR., APPELLANT

v.

MARION BARRY, MAYOR, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-01543)

On Motion to Dismiss, or in the Alternative
for Summary Affirmance

Filed January 28, 1983

Before: TAMM, WALD and SCALIA, Circuit Judges.
Opinion Per Curiam.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

Upon consideration of Appellee's motion to dismiss, or in the alternative, for summary affirmance as well as the response to the motion, it is

ORDERED by the Court that the motion to dismiss for lack of a final appealable order is denied. The District Court's dismissal of plaintiff's action with respect to defendant Jack Vincent terminates the action below. It is

FURTHER ORDERED by the Court that the alternative motion for summary affirmance is granted. The District of Columbia and its Mayor Marion Barry cannot be held liable on a theory of *respondent superior* either under 42 U.S.C. § 1983 or in a *Bivens*-type¹ action. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982).

PER CURIAM: We note that the complaint in the instant case contains an allegation that the police officer "was acting fully within the scope of his employment and pursuant to the policies of defendant corporation."

In *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that although *respondent superior* was not available as a basis for 42 U.S.C. § 1983 liability on the part of local government bodies, 436 U.S. at 664 n.7, local government units can be sued under 42 U.S.C. § 1983 where the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690.

The Supreme Court recently had occasion to review a complaint for the sufficiency of its allegations in this regard. In *Polk County v. Dodson*, 454 U.S. 312 (1981), the *pro se* plaintiff's only reference to governmental poli-

cies was the "bald allegation that [Defendant] had injured him while acting pursuant to administrative 'rules and procedures for . . . handling criminal appeals' and that [Defendant's] employers were therefore responsible for [Defendant's] actions." 454 U.S. at 326. The Court concluded that "even in light of the sympathetic pleading requirements applicable to *pro se* petitioners," *id.*, this allegation did not describe a constitutional tort actionable under § 1983, since "official policy must be the 'moving force of the constitutional violation' in order to establish liability of a governmental body under § 1983." *Id.*, citing *Monell*, *supra* at 694.

In the instant case, petitioner has made a similarly conclusory allegation. The mere assertion that the police officer "was acting fully within the scope of his employment and pursuant to the policies of defendant . . ." is not specific enough to withstand dismissal. Petitioner pointed to no rule, procedure or policy of the District which would require or even permit the alleged unconstitutional actions. In other words, he failed to allege that his claimed constitutional harm was *caused* by a "policy statement, ordinance, regulation, or decision promulgated or adopted by [defendants]." *Monell*, *supra* at 690. Absent such allegation the complaint must fail.

Circuit Judge TAMM did not participate in the foregoing decision.

¹ *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 338 (1971).

law assault cause of action for which D.C. Code § 12-301(4) provides a one-year limitations period. Application of that period is not inconsistent with any federal policy underlying the constitutional cause of action. The one-year period therefore applies to, and bars, appellant's claim.

On remand, the district court should examine the validity of service on defendants Davis, Pyles, Wright, Andres, Everett, and Jacobs. It should also allow appellant an opportunity to amend his complaint to allege some actionable misconduct (in the incidents described in the complaint) on the part of named defendants other than Davis and Pyles. Only those defendants properly served and adequately charged with misconduct may remain in the case; they will remain, however, for purposes of the two surviving nonconstitutional tort claims as well as their constitutional analogues. Those claims are the June 1979 assault claim and the February 1978 seizure and conversion claim, in both their constitutional and common-law forms. All other claims are dismissed, and the District of Columbia is dismissed as a party on all claims.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1422

CLAF McCLAM, APPELLANT

v.

MAYOR MARION BARRY,

MUNICIPALITY OF THE DISTRICT OF COLUMBIA, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 80-02244)

Argued September 20, 1982

Decided January 4, 1983

William R. Robertson (appointed by this Court), for appellant. *Amanda B. Pederson*, was on the brief, for appellant.

Leo N. Gorman, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

L. Reischel, Deputy Corporation Counsel, and *Laura W. Bown*, Assistant Corporation Counsel, were on the brief, for appellees.

Before: *MIRVA* and *BORK*, *Circuit Judges*, *BAZELON*, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge BORK*.

BORK, *Circuit Judge*: Appellant *Claf McClam* filed a pro se complaint in this case on September 4, 1980. The complaint, which names nine defendants, alleges that (1) in February 1978, defendant *Davis*, an officer with the District of Columbia Metropolitan Police Department, seized appellant's automobile and, instead of depositing it in a police yard for impounded property, converted it to his personal use; (2) in May 1978, defendant *Davis* assaulted appellant without cause and broke his elbow; and (3) on June 14, 1979, defendant *Davis*, together with defendant *Pyles*, who was also a District of Columbia police officer, planted a gun on appellant, which resulted in his false arrest and imprisonment, and assaulted and threatened to kill him. The complaint does not allege facts suggesting misconduct by the other named defendants. Based on these three incidents, the complaint alleges both common-law and constitutional torts, the latter allegedly arising directly under the Constitution as *Bivens*-type actions, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The causes of action here accrued before 42 U.S.C. § 1983 (1976) became applicable to the District of Columbia. See *District of Columbia v. Carter*, 409 U.S. 418 (1973).

In response to the complaint, appellee District of Columbia moved for dismissal or summary judgment.¹ The district court dismissed all claims in the case. The court held that the common-law claims were barred by appel-

¹ Although the District of Columbia is not named in the complaint as a party, the district court treated it as a party, and no named party has challenged that treatment.

lant's failure to comply with D.C. Code § 12-309 (1981), which requires written notice to the District of personal injury or property-damage claims within six months of the injury or damage. The court dismissed the constitutional-tort claims on the ground that they were barred by the applicable one-year District of Columbia statute of limitations, D.C. Code § 12-301 (4) (1981). This court subsequently affirmed the decision "as to all claims except those based on constitutional torts." Record at 14. In this appeal, the principal, though not the only, issue is whether the district court correctly dismissed the constitutional-tort claims by applying the one-year statute of limitations. We affirm in part, reverse in part, and remand for further proceedings.

DISCUSSION

To clarify what issues are presented for decision and what issues remain on remand, it is necessary to discuss who the parties are, a subject that is somewhat confused at this stage. The district court observed that only three of the nine named defendants were served with process, and the court treated the three served defendants as out of the case. It substituted the District of Columbia for two of them (Mayor *Barry* and Police Chief *Jefferson*) and remarked that "plaintiff makes no allegations of misconduct by" the third (Officer *Gallup*). Record at 8 n.4. The court's reliance, in dismissing the common-law tort claims, on D.C. Code § 12-309, which applies only to the District, presupposes that only the District, and none of the named defendants, remained as a party.

At the time we affirmed the decision below on the common-law claims, we were not presented with a serious question about the district court's treatment of the parties. That ruling should be understood as having been made on the assumption that only the District of Columbia was a defendant. We simply did not consider whether other defendants properly remained in the case.

Addressing the issue for the first time, we agree with appellant that the validity of service is not now before us. Brief of Appellant at 2 n.1. Invalid service is a ground for dismissal, Fed. R. Civ. P. 12(b) (5); *Peterson v. Sherman*, 635 F.2d 1335, 1337 (8th Cir. 1980), but the record is unclear on the validity of the service in this case. On remand, the district court should address the issue. If the district court concludes that service was valid, it must consider both the constitutional and the common-law claims that remain, but D.C. Code § 12-309, which applies only to the District of Columbia, is no ground for dismissal against any other defendant. For purposes of this appeal, we assume without deciding that failure of service has not removed defendants Davis, Pyles, Wright, Andres, Everett, and Jacobs from the case.

Appellees argue that the cases against Mayor Barry, Police Chief Jefferson, and Officer Gallup were properly dismissed because the complaint alleges no misconduct on the part of these defendants, who, they correctly observe, as co-employees of Officers Davis and Pyles, cannot be liable on a theory of respondeat superior. *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982). Indeed, appellees contend that the same argument warrants dismissal of the cases against all of the defendants except Officers Davis and Pyles. Appellees are correct in stating that the complaint alleges no wrongdoing whatever on the part of anyone but Officers Davis and Pyles and thus fails to state a cause of action against any other defendant. The complaint fails to meet the fundamental requirement of notice pleading, to put each defendant on notice of the alleged wrong for which the plaintiff seeks relief. See Fed. R. Civ. P. 8; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202, at 59-66 (1969). This failure, however, does not justify dismissal at this juncture. Plaintiff filed his complaint pro se; he should be given an opportunity to make his general allegations more specific by pointing to some actionable misconduct on the part of defendants other than Officers Davis and

Pyles, if there was any, in the incidents described in the complaint. If no defendant would be prejudiced thereby, the district court should allow the filing of the more specific, amended complaint. See Fed. R. Civ. P. 15; *Foman v. Davis*, 371 U.S. 178 (1962); *Wyant v. Crittenden*, 113 F.2d 170, 175 (D.C. Cir. 1940); *Gutierrez v. Vergari*, 499 F. Supp. 1040 (S.D.N.Y. 1980).

The case against the District of Columbia, however, should be dismissed because of appellant's failure to comply with D.C. Code § 12-309. That section provides:

An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section.

The district court held that this section barred appellant's common-law claims against the District, no adequate notice having been given to the Mayor. This court affirmed that holding. As appellant gave no notice of his constitutional claims to the District, those claims against the District are barred if this notice provision applies to *Bivens*-type suits. For the reasons set out below, we hold that it does.

This court has previously stated, even if it has not squarely held, that the provision applies to a constitutional cause of action. In *Marshall v. District of Columbia Government*, 559 F.2d 726 (D.C. Cir. 1977), the court remanded the case for the district court to consider whether the jurisdictional amount requirement of 28 U.S.C. § 1331(a) (1976) applied to bar the plaintiff's claim that discrimination against him on the basis of his status as an adjudicated bankrupt violated the

Constitution. The court pointed out that, even if the claim were not barred by the jurisdictional amount requirement, the claim might nonetheless be barred because “[s]uits against the District of Columbia are subject to a six-month notice requirement. D.C. Code § 12-309 (1973).” 559 F.2d at 730. Thus, this court has already rejected the holding in *Lively v. Cullinane*, 451 F. Supp. 999, 1000 (D.D.C. 1976)—the one case relied on by appellant—that D.C. Code § 12-309 applies only to common-law and not to constitutional claims. In *Delums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), moreover, this court devoted three pages to discussing whether, in a *Bivens*-type class action, a single notice by the class counsel sufficed to discharge the “statutory notice requirements of 12 D.C. Code § 309” for all the class members. *Id.* at 228-30. That entire discussion was pointless unless the local law applies to constitutional-tort claims, and the court nowhere suggested that applicability of the provision was merely assumed for purposes of the case.

Although those cases effectively foreclose the issue, we think it worth mentioning several considerations that independently support the view that section 12-309 applies to constitutional claims. First, the language of the provision is unquestionably broad; it cannot be read to contain even a hint that it applies only to common-law claims. In addition, constitutional claims clearly come within the purposes of the provision, which are, “primarily, to provide the District an opportunity to investigate claims while the circumstances giving rise to them are fresh and, secondarily, to provide an opportunity for settlement.” *Delums v. Powell*, 566 F.2d at 230. The provision’s functions of “protect[ing] the District of Columbia against unreasonable claims” and of “encourag[ing] the prompt settlement of meritorious claims,” *Pitts v. District of Columbia*, 391 A.2d 803, 807 (D.C. 1978), would be significantly undercut by the exclusion from its coverage of all federal or even all constitutional claims

for damages. We infer that the D.C. Code provision was an intentional limitation on the right to bring even federal causes of action for damages against the District of Columbia. That inference is further supported by Congress’s express provision of similar notice requirements in various federal civil rights laws. See, e.g., 42 U.S.C. § 2000e-5(e) (1976) (requiring notice to EEOC of employment discrimination claim within 180 days of accrual of claim, or within 300 days in certain cases); 29 U.S.C. § 626(d) (1) (1976) (requiring notice to Secretary of Labor of age discrimination claim within 180 days of accrual of claim).

On the decisive issue of congressional intent, therefore, the D.C. notice provision is unlike the police-recordkeeping provision at issue in *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973). The court there accurately characterized the recordkeeping law as a “local housekeeping” provision enacted “as part of a general revision of police recordkeeping procedures” and not intended “to limit the remedial jurisdiction of the Federal courts.” *Id.* at 972. The D.C. law at issue in *Sullivan*, moreover, would have foreclosed the most effective forward-looking remedy for unconstitutional arrests, namely, expungement of records. In contrast, the notice provision here neither removes a traditional equitable remedy nor presents substantial obstacles to the prosecution of a constitutional-tort claim; it merely establishes a requirement that any conscientious prospective plaintiff can readily meet and that has many analogues in federal civil rights laws.

Application of D.C. Code § 12-309 to constitutional claims is also supported by the rationale of the rule, discussed more fully below, requiring application of local statutes of limitations to claims based on federal laws that specify no limitations period. That rule rests on deference to the local balancing of interests embodied in statutes of limitations—a balancing of the interest in

allowing the prosecution of valid claims against the interest in preventing the prosecution of claims that, because of delay, cannot be fairly litigated. See *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975). The same balancing of interests lies behind the D.C. Code notice provision. For all these reasons, we hold that the D.C. Code notice provision bars appellant from pursuing his claims against the District.

The statute-of-limitations issue presented in this case does not arise with respect to all of the claims in appellant's complaint. First, as both parties agree, the seizure and conversion claim accruing in February 1978, in both its constitutional and common-law forms, is not subject to the one-year limitation period of D.C. Code § 12-301(4). Rather, the applicable statute of limitations is three years. The common-law version clearly falls under the three-year rule of D.C. Code § 12-301(2), which covers actions "for the recovery of personal property or damages for its unlawful detention." The constitutional claim falls either under that rule or under the three-year rule of D.C. Code § 12-301(8), which covers actions "for which a limitation is not otherwise specially prescribed." Plaintiff having filed his complaint on September 4, 1980, his seizure and conversion claim is timely.²

For different reasons, the statute-of-limitations issue is not presented either by the false-arrest component or by the assault component of the claim arising out of appellant's arrest on June 14, 1979. As to the false-arrest

² Appellee contends that the factual allegations in the complaint cannot give rise to a Fourth Amendment violation. Because this argument was not addressed below, we do not here analyze the legal standards to be applied, leaving that task to be performed in the first instance by the district court, which might require fuller development of the factual record before addressing the issue.

claim, both the common-law and constitutional versions are barred. A common-law false arrest claim is defeated by a subsequent conviction on the charges on which the claimant was arrested. See *Menard v. Mitchell*, 430 F.2d 486, 491 n.26 (D.C. Cir. 1970); 1 F. Harper & F. James, *The Law of Torts* § 4.12, at 345 (1956). Appellant's conviction here on the charges on which he was arrested on June 14, 1979, see Appendix to Brief for Appellee, bars his common-law false arrest claim. The constitutional version of that claim, which appellant concedes is merely a common-law false arrest claim in constitutional dress, we conclude must likewise be dismissed.

First, this court has stressed the near identity of the "common law and constitutional variants" of "[t]he tort action of false arrest" brought against police officers. *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978). The court noted in *Dellums* that both the interests protected and the "focal point[s]" of the two actions—whether the arresting officer was justified in ordering the arrest—are the same. *Id.* Indeed, that case held that the mechanics of pleading and proof in a *Bivens*-type action are identical to those in the parallel common-law action, and the opinion analyzed the elements of the claims as if they were identical. *Id.* at 175-76. It follows from *Dellums* that, if subsequent conviction establishes as a matter of law that the arrest was justified for common-law purposes, it should likewise establish that the arrest was justified for constitutional purposes. See *Martin v. Delcambre*, 578 F.2d 1164, 1165 (5th Cir. 1978); *Shank v. Spruill*, 406 F.2d 756, 757 (5th Cir. 1969).³

³ In this case, we may reach the same conclusion by a different route. The factual basis for appellant's constitutional false-arrest claim is that the gun he was convicted of possessing was planted on him by the arresting police. That contention, however, was appellant's defense at his criminal trial, and the jury resolved the factual issue raised by that claim against him, a resolution upheld by the District of

The reasons for dismissing the constitutional false-arrest claim do not apply to the assault component of the claim arising from the arrest on June 14, 1979. Nor does that component, in either its constitutional or common-law form, present any statute-of-limitations problem. Appellees correctly concede that, whatever statute of limitations applies to this 1979 assault claim, its running was tolled by appellant's imprisonment, which commenced at the time the cause of action accrued and continued at least until appellant filed his complaint. See D.C. Code § 12-302 (1981). There is thus no statute-of-limitations bar to appellant's pursuing his claim that the arresting officers unlawfully assaulted and threatened to kill him.

The only statute-of-limitations question in this case is which limitations period applies to the constitutional form of the May 1978 assault claim, which we will refer to

Columbia Court of Appeals. See Appendix to Brief of Appellee. Appellant should be precluded from relitigating the issue here.

Allen v. McCurry, 449 U.S. 90 (1980), held that collateral estoppel should bar an action under 42 U.S.C. § 1983 (1976) based on factual claims actually, fairly, and fully litigated, and decided against the section 1983 claimant, in an earlier state-court trial, even where the trial was a criminal trial in which the section 1983 claimant was the defendant. That decision rests on the Supreme Court's conclusion that section 1983 was not intended to derogate from the federal courts' general, deep-rooted practice of applying collateral estoppel to state-court judgments. The creation of *Bivens*-type causes of action was likewise not so intended, the purpose being merely to create a damages remedy, parallel to section 1983, against federal officials in some circumstances. See Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). For that reason, and because fairness and judicial orderliness are served by maintaining that parallelism, collateral estoppel should apply in *Bivens*-type actions as it applies in section 1983 actions. The factual basis of appellant's constitutional false-arrest claim having already been decided against him in the District of Columbia criminal proceedings, his claim must be dismissed.

simply as the assault claim. (The common-law form is clearly barred by D.C. Code § 12-301(4).) Both parties agree that because no statute of limitations for this *Bivens*-type action has been expressly provided by Congress, the proper statute to apply is "the most appropriate one provided by [D.C.] law." *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975).⁴ Appellees contend that the applicable statute is D.C. Code § 12-301(4), which specifies a one-year period for actions "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment." Appellant contends that the constitutional basis of his claim makes application of that section inappropriate and that the only appropriate statute is D.C. Code § 12-301(8), which specifies a three-year period for actions "for which a limitation is not otherwise specially prescribed." Our analysis of the Supreme Court's pronouncements on this subject lead us to conclude that the applicable statute of limitations in this case is section 12-301(4). Because appellant filed his complaint more than one year after his assault cause of action accrued, he may not pursue that claim.

This court has never squarely faced the question of what local statute of limitations applies to a *Bivens*-type action for assault. In *Eikenberry v. Callahan*, 653 F.2d 632, 635 & n.11 (D.C. Cir. 1981), the court referred to "the three-year period applicable to *Bivens* actions brought in the District of Columbia," citing D.C. Code § 12-301(8). The statute of limitations issue was not presented in the case, however, and the statement was made in passing, unsupported by any discussion. In any event, the action sought damages not for assault but for a violation

⁴ We thus treat the District of Columbia as a state, see *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977), because there is no evidence that Congress specifically contemplated its own causes of action, such as section 1983, in enacting the D.C. Code statute of limitations.

of the First Amendment that bears no resemblance to any of the common-law torts listed in D.C. Code § 12-301(4). Thus, section 12-301(8) provided the proper limitations period in that case. Similarly, in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), the court agreed with the parties to the case that section 12-301(8) applied, but the action was primarily for unlawful conspiracy to deprive plaintiff of his job, an allegation not covered by section 12-301(4) or by any other D.C. Code provision but section 12-301(8). In any event, the action was found time-barred even under the three-year rule. In *Macklin v. Spector Freight Systems*, 478 F.2d 979, 994 (D.C. Cir. 1973), decided before *Johnson v. Railway Express Agency*, the court applied section 12-301(8) to a federal civil rights claim, but the claim there, brought under 42 U.S.C. § 1981 (1976), was for racial discrimination, clearly not analogous to the torts listed in section 12-301(4).⁵ In none of these cases did the court undertake any analysis of the statute-of-limitations problem either for constitutional actions generally or for assault claims in particular.

Appellant advances several arguments in support of his contention that the limitations period for the local assault law is inapplicable to the constitutional assault action. All of the arguments apply not only to assault claims but to all Constitution-based claims with common-law analogues. Thus, appellant argues that the two forms of claim protect different interests, noting that in *Bivens*, 403 U.S. at 394, the Supreme Court stated that “[t]he

interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.” Appellant also argues that the elements and sources of the two kinds of causes of action are different, in that the constitutional claim requires proof of the denial (1) under color of local law (2) of a constitutional right, two elements irrelevant to the common-law assault cause of action. Appellant further argues that, as Justice Harlan once stated in a different context, “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.” *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Finally, appellant argues that application of the local one-year limitations period would undermine the principal goals of *Bivens*-type actions—to provide compensation for and to deter the violation of constitutional rights.

Appellant’s arguments have been relied on in various degrees in several circuit court cases holding inapplicable to Constitution-based claims state statutes that, like D.C. Code § 12-301(4), specify limitations periods for particular analogous common-law torts. *E.g.*, *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980) (adopting much of the analysis of *De Malherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335 (N.D. Cal. 1978)). In contrast, those arguments have been rejected, either explicitly or implicitly, in other circuit court cases holding such statutes of limitations applicable to Constitution-based claims. *E.g.*, *Walden, III, Inc. v. Rhode Island*, 576 F.2d 945 (1st Cir. 1978); *Carmicle v. Weddle*, 555 F.2d 554 (6th Cir. 1977); *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (en banc). We are

⁵ In *Payne v. Government of the District of Columbia*, 559 F.2d 809, 817 n.32 (D.C. Cir. 1977) (opinion of Robinson, J.), Judge (now Chief Judge) Robinson stated in passing that the interests protected by a constitutional cause of action for certain assaults differed from those protected by the local cause of action for assault. But Judge Robinson was not speaking for the court, and he did not, in any case, argue that the differences he alluded to entailed a difference in the applicable statute of limitations.

not persuaded by appellant's arguments and agree with the latter line of cases.

At the outset it is important to note that we need not reject appellant's contentions that constitutional claims differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance. For some claims, and in some respects, those contentions are undoubtedly true.⁶ Appellant has failed, however, to establish that they entail rejection of the local limitations period for the common-law cause of action. Indeed, the governing Supreme Court decisions strongly suggest that the differences are not decisive ones for statute-of-limitations purposes.

In *Johnson v. Railway Express Agency*, the Supreme Court established the general principle that where "there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action . . . , the controlling period would ordinarily be the most appropriate one provided by state law." 421 U.S. at 462. The Court explained the policy of deference to state policy judgments that lies behind the principle:

Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. . . . In borrowing a state period of limitation for

⁶ The special character of constitutional claims might be indicated by Congress's having provided for the awarding of attorney's fees to plaintiffs who win on some civil rights claims. 42 U.S.C. § 1988 (1976). Because it is doubtful that Congress could similarly provide for attorney's fees in state common-law actions, however, the federal attorney's fees statute cannot be considered strong evidence of Congress's view of the importance of constitutional claims against government officials relative to analogous common-law claims against such officials.

application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit . . . on the prosecution of a closely analogous claim.

Id. at 463-64. Noting that an exception to the rule requiring application of the state statute exists where its "application would be inconsistent with the federal policy underlying the cause of action," *id.* at 465, the Court held that the exception did not demand tolling of the statute of limitations in an action brought under 42 U.S.C. § 1981 (1976) while the plaintiff pursued the administrative remedies required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1976). The section 1981 action was therefore barred by the one-year limitations period assumed to be applicable in the case. 421 U.S. at 462 n.7.

Johnson requires a court deciding what state statute of limitations, if any, applies to a federal cause of action to choose the statute applicable to the most "closely analogous claim" unless applying that statute would be inconsistent with relevant federal policies. We believe that, contrary to appellant's contention, the Supreme Court did not intend the constitutional character of a cause of action by itself to be a ground for rejecting as not closely analogous an otherwise identical common-law cause of action. First, the Court made a point of noting that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Id.* at 464. Second, and more important, appellant's interpretation of the *Johnson* rule conflicts with the Supreme Court's formula for choosing a state limitations period. If the federal, or constitutional, character of a claim meant that some state limitations periods were too short, the Court would, presumably, have said so, and would not have directed that the period chosen be that applicable to a "closely analogous claim."

This reading of *Johnson* is reinforced by the Supreme Court's decision in *Board of Regents v. Tomano*, 446

U.S. 478 (1980), to adopt state tolling provisions along with state limitations periods, a decision that underscores the policy of deference to state judgments behind the *Johnson* rule. The *Tomano* Court explained the state judgment typically embodied in statutes of limitations as follows:

Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which result in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Id. at 487. As this passage makes clear, the state judgment behind the establishment of limitations periods typically concerns two subjects: factfinding accuracy and settled expectations. Given a federal cause of action for which no limitations period is specified by federal law, some limitations period is required in order to avoid litigation that impairs accuracy or defeats expectations. *Johnson* and *Tomano* direct that the trial court adopt the state statute of limitations for the most closely analogous claim because, when federal law has not spoken, the state statute is the only law available that reflects the appropriate judgment about factfinding accuracy and settled expectations. It follows that, in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should select the claim most closely comparable to the federal claim with respect to factfinding

accuracy and settled expectations. The comparison of any two claims will generally focus on the facts that must be litigated in trying them.⁷

We need not, and we cannot, say in advance how any given federal cause of action compares in the relevant respect with any given category of claims for which District of Columbia law specifies a limitations period. The proper mode of comparison is clear, however, and so too are several of its consequences. First, two claims need not be identical to be analogous for statute-of-limitations purposes, and even some significant differences will not warrant rejection of a specified period and adoption of the residual provision. See, e.g., *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 414 (D.C. Cir. 1977) (even if local blue sky law requires no proof of scienter, its limitations period applies to action under section 10(b) of the Securities Exchange Act of 1934, which requires such proof: "this possible difference between the federal statute and the local statute is easily outweighed by their similarities in both purpose and substance"). Second, some claims, such as discrimination claims, are clearly not analogous to any of the causes of action listed in D.C. Code § 12-301(4). This court's opinions applying the residual provision to certain Constitution-based actions, see pp. 11-12 *supra*, are thus fully consistent with, indeed are explained by, our interpretation of the *Johnson* rule.

Most important, it is evident how to apply the proper mode of comparison in at least one important class of cases, a class that includes this case. If two claims, such as common-law false arrest and constitutional false ar-

⁷ Not all facts put in issue by a given claim are important in the task of comparison. For example, that the defendant's action was done in his official capacity must be proved in a constitutional case, but the issue will usually be so simple a factual (as opposed to legal) matter that it will be insignificant for purposes of comparing claims in the respects relevant under *Johnson* and *Tomano*.

rest, or common-law assault and constitutional assault (as alleged here), are so alike that "plaintiffs can be expected to plead [the] common law [claim] as a pendent claim in constitutional suits," *Dellums v. Powell*, 566 F.2d at 176 n.9 (false arrest), then the same judgment about repose applies to both claims. For such pairs of claims, the facts to be proved are largely the same, and principally for that reason but also because the two claims grow out of the same incident and seek to vindicate the same interests, settled expectations must be judged the same. Here, we conclude, the local-law claim that is "closely analogous" to the constitutional assault claim is the common-law assault claim.

Turning to the second aspect of the *Johnson* rule, appellant argues that, even if the most closely analogous claim to his constitutional assault claim is one subject to a one-year limitations period, application of the one-year period would be "inconsistent with the federal policy underlying the [constitutional] cause of action." *Johnson*, 421 U.S. at 465. Appellant's arguments in support of this contention, however, are the same general ones advanced in support of the contention that his constitutional claim is not analogous to his common-law claim. They fare no better in this context than in that. In *Johnson* the Supreme Court rejected the proposition that there is "anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." 421 U.S. at 364. In *Tomano* the Court observed that application of state limitations periods is not inconsistent with either of the two principal policies embodied in section 1983, deterrence and compensation. 446 U.S. at 488. It also observed that the need for uniformity does not "warrant the displacement of state statutes of limitations for civil rights actions." *Id.* at 489.⁸ The Court referred

⁸ Although both cases concerned claims brought under civil rights statutes rather than directly under the Constitution, the Court's reasoning should apply equally to *Bivens*-type

to *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978), as establishing that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." 446 U.S. at 488. Appellant here has pointed to nothing more than that.

Finally, we find no merit in the argument that D.C. Code § 12-301(4)'s one-year period is simply too short for application to the constitutional cause of action. Nothing in *Johnson* or *Tomano* suggests that a one-year period is, solely by virtue of its duration, inconsistent with any federal policy behind Constitution-based actions, including those of deterrence and compensation. *Johnson* may even be read to suggest, by omission, that one year is sufficient: the opinion lists (though does not address) several possible challenges to the one-year period presumed applicable; a challenge based simply on the length of the period is not among those listed. 421 U.S. at 462 n.7. In any event, we fail to see how a court could determine how long a limitations period should be for a given claim except by drawing analogies to claims with specific periods, and that task is one built into the first aspect of the *Johnson* rule. Mere shortness of time provides no independent ground for rejecting a state limitations rule.⁹

In short, appellant's constitutional assault claim is closely analogous in the relevant respect to the common-law actions, which rest on no policies different from those behind section 1983, the statute in *Tomano*.

⁹ In *Regan v. Sullivan*, 557 F.2d 300, 303 (2d Cir. 1977), the Second Circuit observed that one advantage of applying a limitations period longer than three years to a constitutional claim of false arrest is that criminal proceedings are likely to be completed before the limitations period expires. That advantage, however, is irrelevant for many Constitution-based claims, such as the assault claim here, and it can be achieved in many cases by staying civil cases pending completion of a related criminal case.

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SMALL CLAIMS MEDIATION IN MAINE:
AN EMPIRICAL ASSESSMENT

Craig A. McEwen & Richard J. Maiman

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THE DEVELOPMENT AND CONSEQUENCES OF THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE AND THE QUALIFIED "GOOD FAITH" IMMUNITY FROM LIABILITY UNDER SECTION 1983.

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated*¹

*Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*²

*[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.*³

I. INTRODUCTION

The remedies fashioned to redress violations of the fourth amendment to the United States Constitution continue to be the subject of much judicial, legislative, and scholarly inquiry. In striking the balance between the need to protect individual freedom and the need to protect society from criminal activity, the Supreme Court and Congress have developed two principal remedies for fourth amendment violations: the exclusionary rule and civil actions under 42 U.S.C. § 1983 or under theories of constitutional torts.⁴ In focusing

1. U.S. CONST. amend. IV.

2. 42 U.S.C. § 1983 (Supp. III 1979).

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 58 (1803).

4. A civil action under section 1983 will not lie against a person who acts to deprive a citizen of his constitutional rights "under color of" federal law. The statute, see text accompanying note 2 *supra*, provides a civil action against a person who acts to deprive a citizen of his constitutional rights "under color of" state law. Thus, if a federal officer perpetrates a fourth amendment violation, section 1983 is not applicable. A civil remedy, closely paralleling section 1983, has been developed to affix liability to federal officers under a theory generally referred to as "constitutional tort." Under this theory, a plaintiff alleging a violation of his fourth amendment rights by a federal officer is permitted to sue directly under the Constitution in the absence of statutory provisions conferring jurisdiction on the federal courts to hear such claims. See note 241 *infra*.

on the development of both of these remedies it is assumed that their effectiveness is the true measure of fourth amendment liberties. The fourth amendment is a nullity if there is no effective remedy for its violation. Hence, this Comment rejects the idea that fourth amendment liberties exist independently of remedies for their violation.

To lay a foundation for the comparison of the emerging "good faith" exception to the exclusionary rule and the qualified "good faith" immunity in civil rights cases, this Comment will first summarize the history and philosophic origins of the fourth amendment and the exclusionary rule. This historical evaluation will reveal that various rationales support the existence of the exclusionary rule. The concept of deterrence, now the pre-eminent justification for the rule, is also the basis for the emerging "good faith" exception to that rule. Second, by examining the development of civil actions under section 1983 and under theories of "constitutional tort," the close parallels between the emerging "good faith" exception to the rule and the doctrine of qualified immunity will be demonstrated. The combined effect of the "good faith" exception to the exclusionary rule and the qualified "good faith" immunity in civil rights litigation on the enjoyment of fourth amendment liberties will then be suggested. Finally, a system of remedies for fourth amendment violations which affirms the fourth amendment as a source of constitutional rights will be proposed.

II. THE DEVELOPMENT OF THE EXCLUSIONARY RULE AND THE EMERGENCE OF THE "GOOD FAITH" EXCEPTION

A thorough examination of the evolution of the exclusionary rule is essential to understanding and placing in proper perspective mounting criticism of the rule. The development of the rule since its crystallization in *Weeks v. United States* in 1914 is marked with inconsistencies.⁵ Recent Supreme Court opinions continue to debate the rationale for the rule, for its purpose was never clearly delineated in the Court's earlier efforts. *Weeks* and other early cases saw the rule as part and parcel of fourth amendment rights or as founded upon notions of judicial integrity that required judicial disapproval of constitutional violations. Beginning in 1949 with *Wolf v. Colorado*,⁶ however, the Court began to emphasize deterrence of constitutional violations as a rationale for the exclusionary rule.

A majority of the Court had reached a consensus on the primary rationale for the exclusionary rule by 1976, when *United States v.*

5. 232 U.S. 383 (1914). Prior to *Weeks*, *Boyd v. United States*, 116 U.S. 616 (1886), foreshadowed the adoption of the exclusionary rule by the federal judiciary. However, the adoption of the exclusionary rule as a fourth amendment doctrine was still in doubt until the *Weeks* decision, see *Adams v. New York*, 192 U.S. 585 (1904).

6. 338 U.S. 25 (1949).

*Janis*⁷ and *Stone v. Powell*⁸ were decided. Both opinions clearly stated that exclusion of wrongfully obtained evidence was not a constitutional right; rather, the primary aim of the rule was to deter official conduct in violation of the Constitution. The judicial integrity rationale had become little more than an aspect of the deterrence rationale.

The development of a balancing technique, whereby the Court determined proper instances for application of the exclusionary rule, paralleled the triumph of the deterrence rationale. Under this balancing process, the exclusionary rule is applied only where its deterrent effect outweighs the legitimate costs to society of its application. Both the development of balancing and the preeminence of the deterrence rationale signify the Supreme Court's dramatic reassessment of the role of the exclusionary rule in protecting individuals from violations of their fourth amendment liberties.⁹

As a result of this reassessment, the Court has reduced significantly the number of situations where the exclusionary rule is appropriate. This cutback has been engineered by emphasizing deterrence and using the balancing test, and through the recent development of a "good faith" exception to general application of the rule,¹⁰ which also resulted from the shift in focus from judicial integrity to deterrence. The solidification of the good faith exception in the Court's opinions is apparent despite the fact that the exception is not universally applied. This section will trace the development of balancing, the rise of the deterrence rationale, and the emergence of the good faith exception to the exclusionary rule. These developments occurred concurrently but will be analyzed separately for clarity.

A. *The Early History and Rationale of the Exclusionary Rule*

The early history¹¹ of the exclusionary rule is marked by doctrinal confusion. A review of its beginnings graphically reveals a lack of agreement about the purpose of the rule. In fact, this confusion has allowed the present Court to reshape the rule's philosophic rationale and thereby change the role of the rule in protecting the liberties guaranteed by the fourth amendment.

7. 428 U.S. 433 (1976).

8. 428 U.S. 465 (1976).

9. See text accompanying notes 45-86 *infra*.

10. See text accompanying notes 87-137 *infra*.

11. The term "early history" as it is used here means that period of development before *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* signifies the point at which the Supreme Court began to become inundated with appeals from state courts by appellants asserting violations of the fourth amendment by state officials. As a result, re-fined decisions were necessary, and the Court was faced with the prospect of deciding cases where the social costs were more apparent. See text accompanying notes 45-86 *infra*.

Concern for the excessive use by the British Crown of Writs of Assistance to search colonial property undoubtedly spurred the framers to draft the fourth amendment's prohibition against unreasonable searches and seizures.¹² The constitutional draftsmen failed, however, to provide a remedy for the victim of an unreasonable search or seizure.¹³ Under the English common law, an aggrieved individual could bring a civil action in trespass against the official committing the violation.¹⁴ Hence, the first known remedy did not question the admissibility of illegally seized evidence in a criminal proceeding. American courts initially adopted the English rule allowing introduction of evidence in a criminal trial regardless of the method by which it was obtained.¹⁵ Not until 1886, did the Court consider exclusion of probative evidence as a possible remedy for fourth amendment violations.

That year, the Supreme Court decided *Boyd v. United States*.¹⁶ In *Boyd*, the Court found that a statute requiring production of personal records violated both the fourth amendment's prohibition against unreasonable searches and seizures and the fifth amendment's protection against self-incrimination.¹⁷ The Court failed to distinguish between the acts of seizing an individual's private papers and compelling him to be a witness against himself.¹⁸ However,

12. See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-57 (1937). See also *United States v. Chadwick*, 433 U.S. 1, 6-8 (1977); *Stone v. Powell*, 428 U.S. 465, 482 (1976); *Standford v. Texas*, 379 U.S. 476, 481 (1965); *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366, 452 nn. 191 & 192 (1974).

13. *Coolidge v. New Hampshire*, 403 U.S. 443, 496 (1971) (Black, J., concurring and dissenting).

14. See *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

15. See *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841) (admission of lottery tickets into evidence not affected by fact they were illegally seized); C. McCORMICK, *EVIDENCE* § 165, at 365 (2d ed. E. Cleary 1972); 8 J. WIGMORE, *EVIDENCE* § 2183, at 7 (rev. ed. J. McNaughton 1961). The general rule, according to Wigmore, was that "our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means." J. WIGMORE, § 2183, at 6.

16. 116 U.S. 616 (1886).

17. *Id.* at 638. The statute required production of papers under the threat of automatic conviction for not producing such papers. Justice Bradley, writing for the Court, relied substantially on the English cases of *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763). Lord Camden in *Entick* pointed out the dangers of allowing an inspection of any person suspected of seditious libel upon the discretion of the Secretary of State. Lord Camden's characterization of a basic right to privacy was emphasized by Justice Bradley in *Boyd*, and although *Entick* was a civil action for trespass, the *Boyd* Court found its reasoning equally applicable in a criminal proceeding. 116 U.S. at 630.

18. *Id.* One commentator says that it was gratuitous overkill to hold that the production order in *Boyd* violated both fourth and fifth amendments. J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 58-59 (1966). The decision was undermined in subsequent cases, see, e.g., *Hale*

Boyd did not hold that all evidence obtained as a result of an illegal search or seizure must be excluded from a criminal proceeding. The limited scope of *Boyd* was underscored in *Adams v. New York*,¹⁹ where the Court adhered to the common law rule that "courts do not stop to inquire as to the means by which . . . evidence was obtained."²⁰ Thus, the common law rule preserving the admissibility of illegally obtained evidence was apparently still ingrained in the Court's fourth amendment philosophy.

Ten years later, however, the Court abandoned the common law approach. In *Weeks v. United States*,²¹ the Supreme Court considered whether evidence obtained in a warrantless search must be returned to a criminal defendant accused of illegally using the mails to conduct a lottery. The trial court denied the defendant's "Petition for Return of Private Papers, Books and Other Property," and he was ultimately convicted on the basis of the illegally seized evidence. Relying on the fourth amendment, the Court found that it was prejudicial error not to return to the defendant the illegally obtained evidence.²² In post-*Weeks* decisions, the Court continued liberally to apply the exclusionary rule in federal prosecutions.²³

v. Henkel, 201 U.S. 43, 72-73 (1906)(stating that cases subsequent to *Boyd* have treated the fourth and fifth amendments separately), and all but overruled, see *United States v. Miller*, 425 U.S. 435, 440 n.1 (1976)(fourth amendment implications of *Boyd* regarding subpoenas *duces tecum* undercut).

19. 192 U.S. 585 (1904). While the question presented in *Adams* was whether the fourteenth amendment placed any restrictions on the admissibility of evidence in state trials, the Court dealt only with the threshold question of whether the lawfulness of the seizure could be considered in any case, federal or state. *Id.* at 594.

20. *Id.*

21. 232 U.S. 383 (1914).

22. Although the holding, narrowly stated, was that a criminal defendant's illegally seized property must be returned if the defendant makes a "seasonable application," *id.* at 398, the Court's language goes farther:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393.

23. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921)(exclusionary rule applicable to evidence obtained by a warrantless seizure during an ostensibly unofficial visit to defendant's office); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)(prosecutor could not avoid the exclusionary rule simply by introducing copies of illegally seized documents).

The decision in *Gouled* is also important for its tacit repudiation of the common law rule that evidence is admissible despite the fact that it was illegally obtained. Justice Clark characterized the common law rule as nothing more than a rule of pro-

Belief that judicial integrity required exclusion of improperly seized evidence was the principal basis for the Court's early assertion of the exclusionary rule. Justice Day's *Weeks* opinion evidences this concern: evidence obtained in violation of the Constitution "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution."²⁴ The so-called "imperative of judicial integrity" garnered additional proponents with the Holmes and Brandeis dissents in *Olmstead v. United States*.²⁵ Although some commentators find support in these decisions for a constitutional right of exclusion,²⁶ the primary rationale used by the Court was that the preservation of judicial integrity demanded exclusion of tainted evidence. Interestingly, none of the cases relied on "deterrence" as a justification for the exclusionary rule.

Despite the Supreme Court's willingness to exclude illegally obtained evidence, the states, for the most part, continued to permit its introduction in state criminal proceedings.²⁷ The reason most often advanced was that the legislature should make decisions that would permit the criminal to go free when the constable blunders.²⁸ The states were under no obligation to accept the exclusionary rule because the fourth amendment had not been found applicable in state proceedings.

It was not until 1949 in *Wolf v. Colorado*,²⁹ that the Court found the right to be free from unreasonable searches and seizures "implicit in the concept of ordered liberty"³⁰ and therefore enforceable

cedure and stated, "[a] rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Id.* at 313. For a description of the development of a generally applicable exclusionary rule, irrespective of the source of the evidence, see Comment, *Search, Seizure, and the Fourth and Fifth Amendments*, 31 YALE L.J. 518 (1922).

24. 232 U.S. at 392. See also note 17 *supra*.

25. 277 U.S. 438 (1928). Justice Brandeis offered a lucid statement of the judicial integrity rationale: "And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker." *Id.* at 483.

26. See, e.g., Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

27. Only sixteen states had accepted the exclusionary rule by 1949 and thirty-one had rejected it. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

28. See *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, cert. denied, 270 U.S. 657 (1926). For scholarly criticism of the rule see Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479, 480 (1922). For criticism of the rule in its early period see also Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 369-85 (1939).

29. 338 U.S. 25 (1949).

30. *Id.* at 27 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

against the states through the due process clause. But according to Justice Frankfurter, enforcement of this right raised "questions of a different order."³¹ Frankfurter saw the exclusionary rule as "a matter of judicial implication" rather than an explicit requirement of the fourth amendment.³² The *Wolf* Court reasoned that since "due process" entails no formal or fixed requirements,³³ the rule was only one of many ways to deter unreasonable searches, and exclusion of illegally seized evidence was not therefore constitutionally compelled.³⁴ Accordingly, although *Wolf* articulated the deterrence rationale for the first time, deterrence did not mandate application of the exclusionary rule in state criminal trials.³⁵

Eleven years after *Wolf* in *Mapp v. Ohio*,³⁶ the Court again faced the question presented in *Wolf*: whether due process mandated application of the exclusionary rule in state criminal trials. This time, however, the Court unequivocally decided³⁷ to require the states to exclude all evidence obtained in violation of fourth amendment rights.³⁸ *Mapp* also discussed at length the underpinnings of the ex-

31. 338 U.S. at 28.

32. *Id.*

33. *Id.* at 27.

34. *Id.* at 31. Justice Black's concurring opinion goes even farther by stating that the exclusionary rule is simply a judicially created rule of evidence. *Id.* at 39-40 (Black, J., concurring).

35. The ten years following *Wolf* brought little change in the Court's approach to the applicability of the exclusionary rule to state proceedings. See, e.g., *Irvine v. California*, 347 U.S. 128 (1954). In *Irvine* Californian officers repeatedly entered the defendants' house to plant several listening devices and record dozens of private conversations. The majority found *Wolf* controlling and refused to apply the exclusionary rule to the state criminal proceeding. Cf. *Rochin v. California*, 342 U.S. 165 (1952) (the evidence was obtained by pumping the stomach of the defendant; this conduct so shocked the conscience of the Court that it was deemed inconsistent with notions of due process).

36. 367 U.S. 643 (1961). Just prior to *Mapp*, the Court decided in *Elkins v. United States*, 364 U.S. 206 (1960), that federal prosecutors would no longer be permitted to use evidence illegally seized by state officials in federal criminal prosecutions. The early 1960's, therefore, marked a period of tremendous change in fourth amendment jurisprudence. See P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 190 (1970).

37. The decision in *Mapp v. Ohio* was 6-3. However, the opinion of the Court was only a plurality opinion with Justices Douglas and Black concurring. Justices Harlan, Frankfurter and Whittaker joined dissenting.

38. 367 U.S. at 655. The Court found it impressive that more than half of the states had accepted the exclusionary rule either judicially or legislatively, *id.* at 651; when *Wolf* was decided only about one-third of the states utilized the rule. This change from a considerable "contrariety of views" by the states regarding the exclusionary rule was a significant factor in the Court's decision. Moreover, the Court found *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), particularly significant. The *Cahan* court had adopted the exclusionary rule because "other remedies [had] failed to secure compliance with the constitutional provisions . . .," *id.* at 445, 282 P.2d at 911-12. *Cahan* buttressed the *Mapp* Court's conclusion that it was senseless to believe that other remedies provided sufficient protection for fourth amendment

clusionary rule. First, the plurality reasoned that the exclusionary rule deterred violation of fourth amendment rights.³⁹ Additionally, the Court justified the rule on grounds of judicial integrity, observing that the judiciary has an obligation to uphold the Constitution and to refuse to consider evidence obtained in contravention of constitutional principles.⁴⁰ However, the Court's reliance on judicial integrity was plainly secondary; the Court concluded by stating that the purpose of the rule was "to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."⁴¹ Nonetheless, because it relied upon both the deterrence and judicial integrity rationales, *Mapp* generated considerable confusion regarding the theoretical basis of the rule.⁴²

Lacking a clear constitutional basis, the rule came under considerable attack from those who objected to its practical consequence⁴³— suppression of probative evidence of criminal conduct often resulting in freedom for clearly guilty defendants. In response, not long after *Mapp*, the Court began to reassess the role of the exclusionary rule. *Mapp* in fact formed the framework for the Court's reassessment by failing to provide a principled constitutionally based rationale for the rule.⁴⁴ Ironically, the *Mapp* Court's reliance on the deterrence rationale as a basis for extending the rule to state criminal proceedings also provided a means for limiting application of the rule.

rights — *Wolf's* rationale was no longer compelling, 367 U.S. at 652-53.

39. 367 U.S. at 648.

40. *Id.* at 659.

41. *Id.* at 656 (quoting from *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

42. Professor Oaks in his article, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 670 (1970), characterized the difficulty in *Mapp*:

The discursive prevailing opinion in *Mapp v. Ohio* quoted the *Elkins* statement and otherwise characterized the exclusionary rule as a "deterrent safeguard," but the decision does not clearly identify the primary basis for the rule because Justice Black's reliance on a self-incrimination theory split the majority on this question.

43. See, e.g., Batey, *Detering Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245 (1976); Boker & Carrigan, *Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule*, 27 HASTINGS L.J. 1291 (1976); Gottlieb, *Feedback from the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?*, 67 KY. L.J. 1007 (1979); Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33 (1978); Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUD. 74 (1974); Oaks, *supra* note 42; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 215 (1978); Comment, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to The § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915 (1978).

44. See Sunderland, *supra* note 26, at 144.

B. The Triumph of the Deterrence Rationale and the Use of Balancing

Two concurrent developments took place as the Court reevaluated the exclusionary rule after *Mapp*. First, deterrence eclipsed judicial integrity as the primary reason for the exclusionary rule. Second, since deterrent effect varies with the circumstances, the Court devised a balancing approach to weigh the rule's efficacy as a deterrent against its societal costs.

Several cases decided after *Mapp* evidence the birth of those developments and the Court's recognition that rigid application of the exclusionary rule might not justify its costs to effective law enforcement. In *Wong Sun v. United States*,⁴⁵ for example, the Court maintained that if evidence is sufficiently purged of the primary taint of illegality, it may be admitted because of the need for highly probative evidence. In *Linkletter v. Walker*,⁴⁶ the Court refused to give *Mapp* retrospective application because to do so would not serve the primary purpose of the rule: deterrence of lawless police conduct.

*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (Bivens I)*⁴⁷ and *Coolidge v. New Hampshire*⁴⁸ also foreshadowed the Court's eventual reassessment of the exclusionary rule. In *Bivens I*, decided before *Coolidge*, Chief Justice Burger severely criticized the exclusionary rule, opining that the rule serves no effective deterrent purpose.⁴⁹ Moreover, the Chief Justice argued that the rule fails adequately to punish those who violated constitutional proscriptions — law enforcement officials. Rather, the rule's retributive effects befall only prosecutors and the innocent victims of crimes.⁵⁰ However, the Chief Justice refrained from imposing a judicially constructed substitute for the exclusionary rule, leaving that task to the legislative branch.⁵¹ Criticism of the rule was reiterated in *Coolidge*, where four members of the Court expressed doubt about the continued vitality of the rule. Justice Harlan would have overruled *Mapp*, thus limiting the exclusionary rule to federal trials.⁵² Justices Blackmun and Black agreed that the fourth amendment does not support the exclusionary rule.⁵³ Finally, relying on his

45. 371 U.S. 471, 487-88 (1963)(where the Court held derivative fruits of an illegal arrest are inadmissible at trial).

46. 381 U.S. 618, 636 (1965).

47. 403 U.S. 388 (1971).

48. 403 U.S. 443 (1971).

49. *Id.* at 416-18 (Burger, C.J., dissenting).

50. *Id.* at 416.

51. 403 U.S. at 422-23.

52. *Id.* at 490 (Harlan, J., concurring).

53. *Id.* at 510 (Blackmun, J., dissenting); 403 U.S. at 496 (Black, J., concurring and dissenting).

Bivens I dissent Burger advocated legislative revision of the rule.⁵⁴ Thus, the Court expressed considerable dissatisfaction with the exclusionary rule; only time and the proper case postponed manifestation of this dissatisfaction in a majority opinion.⁵⁵

These developments culminated in *United States v. Calandra*,⁵⁶ where a new, emerging majority held that the exclusionary rule need not be applied to grand jury proceedings.⁵⁷ In so holding, the Court reiterated that the prime purpose of the rule is to deter future unconstitutional police conduct.⁵⁸ Moreover, the Court refused to apply what it considered to be a judicially created remedy, rather than a constitutional right, to all types of cases.⁵⁹ "As with any remedial device," the Court stated, "the application of the rule has been restricted to those areas where its remedial objectives are most efficaciously served."⁶⁰ Hence, to determine whether the rule should apply to grand jury proceedings, *Calandra* balanced possible injury to the grand jury system against the potential benefit of invoking the rule in that context.⁶¹ Finding that extending the rule to grand jury proceedings would "achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury," the Court refused to apply the exclusionary rule.⁶²

A strident dissent by Justice Brennan underscored the extent to which *Calandra* departed from the Court's pronouncements in *Mapp*. Brennan reasoned that application of the exclusionary rule was mandated by the fourth amendment.⁶³ He questioned the majority's characterization of the rule as a remedy, arguing that the rule was an integral part of the fourth amendment's guarantee of individual privacy. Brennan also noted that the majority had narrowed the scope of the exclusionary rule by "discount[ing] to the point of extinction the vital function of the rule to insure that the

54. *Id.* at 492-93 (Burger, C.J., dissenting).

55. Cases after *Bivens* I began to indicate the Court's readiness to reassess the exclusionary rule. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

56. 414 U.S. 338 (1974).

57. *Id.* at 351-52.

58. *Id.* at 347.

59. *Id.* at 348. *Accord*, *United States v. Peltier*, 422 U.S. 531, 538-39 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966); *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965). The majority's characterization of the exclusionary rule as a remedy rather than a right should have surprised no one after Frankfurter said in *Wolf* that the exclusionary rule was not an explicit requirement of the fourth amendment but a matter of judicial implication. 338 U.S. at 28.

60. 414 U.S. at 348.

61. *Id.* at 349.

62. *Id.* at 351-52.

63. *Id.* at 360-62 (Brennan, J., dissenting).

judiciary avoid even the slightest appearance of sanctioning illegal government conduct."⁶⁴

Post-*Calandra* decisions clarified and developed more fully the Court's position that deterrence supplied the primary rationale for the exclusionary rule and that a balancing approach was appropriate for determining when to invoke it. Equally important, is the fact that the good faith exception to the exclusionary rule slowly began to emerge in the Court's post-*Calandra* decisions. Three opinions illustrate its development.⁶⁵ In *Michigan v. Tucker*,⁶⁶ the Court considered whether to exclude testimony of a witness whose identity was learned by police during an improper custodial interrogation of the defendant.⁶⁷ The opinion by Justice Rehnquist openly balanced the public interest in convicting guilty criminals against the deterrent effect on police of excluding illegally obtained evidence. The Court held the evidence admissible, finding minimal deterrent effect where the officers acted in good faith. The rationale of judicial integrity was, by now, relegated to a footnote.⁶⁸

In *United States v. Peltier*,⁶⁹ the Court refused to give the exclusionary principle of *Almeida-Sanchez v. United States*⁷⁰ retroactive effect. *Almeida-Sanchez* held that a warrantless automobile search without probable cause conducted within 25 miles of the Mexican border violated the fourth amendment. Although *Peltier* hinted at the reemergence of judicial integrity as a factor in the Court's decision making process, Justice Rehnquist placed little weight on the judicial integrity rationale:

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have

64. *Id.*

65. See *Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Peltier*, 422 U.S. 531 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974).

66. 417 U.S. 433 (1974). The police had failed to advise the defendant of his rights to have free counsel if he was indigent. Although the questioning occurred prior to *Miranda v. Arizona*, 384 U.S. 436 (1966), the trial took place afterwards. Because the statements were considered voluntary the defendant was not deprived of his protection against self-incrimination: the "police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." 417 U.S. at 446.

67. 417 U.S. at 435.

68. Addressing itself to the argument that the evidence should be excluded on grounds of judicial integrity, the Court noted that the rationale of judicial integrity is really an assimilation of other rationales and does not provide an independent basis for excluding evidence. 417 U.S. at 450 n.25.

69. 422 U.S. 531 (1975).

70. 413 U.S. 266 (1973).

broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow . . . that the "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.⁷¹

Judicial integrity remains merged with deterrence as a basis for the rule.⁷²

By 1976 the Court had fully developed the balancing approach. In *United States v. Janis*,⁷³ the Court declined to extend the rule to civil proceedings, since the likelihood of deterring unlawful police conduct through application of the rule was not sufficient to outweigh the need for admission of relevant evidence in such proceedings. In so holding, the majority, for the first time, said that the judicial integrity and deterrence rationales have a similar focus — discouraging fourth amendment violations.⁷⁴ In *Stone v. Powell*,⁷⁵ decided the same day, the Court held the rule's application in federal habeas corpus reviews of state proceedings unjustifiable because of the exclusionary rule's minimal deterrent effect in such cases.⁷⁶ Judicial integrity mattered little when a court faced possible exclusion of highly probative evidence.⁷⁷ The judicial integrity rationale was relegated to a position behind deterrence. The *Stone* Court articulated the relationship between deterrence as a rationale for the rule and the balancing approach:

The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal. Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering

71. 422 U.S. at 537-38.

72. Justice Brennan filed a strong dissent, characterizing the majority's approach to the exclusionary rule as a "slow strangulation." *Id.* at 561 (Brennan, J., dissenting). The apparent merging of the judicial integrity rationale into the deterrence rationale prompted a dire prophecy:

The Court's opinion depends upon an entirely new understanding of the exclusionary rule of Fourth Amendment cases, one which, if the vague contours outlined today are filled in as I fear they will be, forecasts the complete demise of the exclusionary rule as fashioned by this Court in over 61 years of Fourth Amendment jurisprudence.

Id. at 551.

73. 428 U.S. 433 (1976).

74. *Id.* at 458-59 n.35.

75. 428 U.S. 465 (1976).

76. *Id.* at 481-82.

77. *Id.* at 485.

Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a national system of criminal justice.⁷⁸

The Court's willingness to focus on deterrence stems from two considerations. First, the Court is dissatisfied with the effect of applying the exclusionary rule in all cases involving unconstitutional police conduct. Egregious and offensive crimes argue against applying the rule where the police officer's good faith conduct was nonetheless technically unconstitutional. Second, and perhaps more importantly, focusing on deterrence gives the Court flexibility to decide when to invoke the rule.⁷⁹ By contrast, because "judicial integrity" is a constant rather than a variable concept, it would result in vindication of an individual's constitutional rights whenever violated; in no instance would a court sanction police conduct violative of the fourth amendment.

The Court's utilization of the deterrence rationale provides critics of the rule with a basis for questioning the continued vitality of the rule.⁸⁰ They point to the paucity of empirical evidence that application of the rule actually deters constitutional violations. One critical study⁸¹ surveyed existing research on the effectiveness of the exclusionary rule as a deterrent to unconstitutional conduct of police officers⁸² and concluded:

[T]oday, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed on the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.⁸³

78. *Id.* at 493-94.

79. As one commentator put it:

The deterrence argument has provided the Supreme Court with a path of least philosophical resistance. In reviewing fourth amendment violations, it is easier to argue lack of a recognizable effect on an absent third person — the police officer — than it is to establish that the privacy of the individual before the court has not been violated unreasonably.

Comment, *supra* note 43, at 923.

80. See note 43 *supra*.

81. Oaks, *supra* note 42.

82. *Id.* at 678-709. The study undertaken by Oaks included surveys taken before and after the decision of *Mapp v. Ohio* and included several major cities within its ambit.

83. *Id.* at 672. Although the author was highly critical of the exclusionary rule and the premise upon which it was based, he was not willing to have it abolished until an adequate alternative remedy could be established. In sum, Professor Oaks argued that

[t]he exclusionary rule should be abolished, but not quite yet.

As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence

Many of the Court's opinions cite this survey for the proposition that the exclusionary rule is an ineffective deterrent in many instances.⁸⁴ Later studies, however, are inconclusive.⁸⁵ The studies do illustrate the impossibility of reaching definite conclusions on the effectiveness of the rule given the difficulty of measuring human variables.⁸⁶

As these studies indicate, the effectiveness of the rule is not obvious from the empirical data. If deterrence is the primary reason for the exclusionary rule, then evidence need not be suppressed where no deterrent effect is likely. Moreover, without reliable empirical evidence of when deterrence works, it becomes difficult to refute a court's assertion that the rule will have no deterrent effect in partic-

that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one.

Id. at 755. The evidence examined by Oaks, however, resulted in no specific findings. The only conclusion which could be drawn by Oaks was that the studies examined "represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." *Id.* at 709.

84. See, e.g., *Stone v. Powell*, 428 U.S. 465, 489 n.27 (1976); *United States v. Janis*, 428 U.S. 433, 448 n.20 (1976); *United States v. Peltier*, 422 U.S. 531, 536 (1975); *United States v. Calandra*, 414 U.S. 338, 348 n.5 (1974); see also opinions of other members of the Court, *Schneekloth v. Bustamonte*, 412 U.S. 218, 267 (1973) (Powell, J., concurring); *Coolidge v. New Hampshire*, 403 U.S. 443, 491 (1971) (Harlan, J., concurring); *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) (wherein the Chief Justice relied on Oaks' work to substantiate his view that the exclusionary rule does not deter unlawful conduct).

85. See, e.g., Canon, *Is the Exclusionary Rule is Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974); Spiotto, *supra* note 43. Critics, however, were quick to point out the deficiencies in these studies, see, e.g., S. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* (1977); Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. Rev. 740 (1974).

86. See Comment, *supra* note 85, at 763-64.

ular circumstances. Hence, the primacy of the deterrence rationale and the inconclusiveness of the empirical data have permitted further reassessment of the applicability of the exclusionary rule. The Court's most recent assessment of the rule examines good faith conduct on the part of police as a concomitant of the variable rationale of deterrence.

C. *The Good Faith Exception to the Exclusionary Rule*

Arguments for limiting the exclusionary rule have increased, with criticism of the rule mounting both on and off the Court. *Stone v. Powell* and *United States v. Janis* represent exceptions to the rule which suggest that the rule does not always serve its essential purpose.⁸⁷ As do the deterrence rationale and balancing approach, the emerging good faith exception to the exclusionary rule gives courts flexibility. Under the good faith exception, evidence obtained by police officers who believed in good faith that their action was lawful is admissible despite a later finding of unconstitutionality. Excluding evidence obtained in good faith, it is argued, cannot deter unlawful conduct.⁸⁸ As will be shown below, this exception finds substantial support in recent opinions written by five different justices. Although the exception awaits further development and articulation, authoritative support exists for extending the doctrine to a broad range of exclusionary rule cases.

The question of the good faith exception to the exclusionary rule began with *Michigan v. Tucker*.⁸⁹ In deciding whether the exclusionary rule was applicable in a fifth amendment context, Justice Rehnquist, writing for the Court, stated:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses must of its force.⁹⁰

Tucker expresses a genuine concern for the difficulties inherent in law enforcement. As Chief Justice Burger argued in his *Bivens* I dissent, "inadvertent errors of judgment" will inevitably occur in the "midst and haste of criminal investigation."⁹¹ Moreover, the present Court is understandably concerned with the costs the exclusionary

87. See text accompanying notes 73-79 *supra*.

88. See, e.g., *Stone v. Powell*, 428 U.S. 465, 540 (1976)(White, J., dissenting).

89. 417 U.S. 433 (1974).

90. *Id.* at 447.

91. 403 U.S. at 418.

rule inflicts on society, when exclusion of probative evidence allows many criminals to go scot-free.⁹²

The concept of good faith, grounded in deterrence, also appeared where evidence was excluded because of concern for judicial integrity. In *Peltier*, the majority found judicial integrity unoffended by the admission of evidence obtained in good faith reliance on the constitutionality of a statute.⁹³ Courts would not be condoning willful disobedience of the Constitution by police officers if no such willfulness existed.⁹⁴ Thus, a good faith exception might have emerged regardless of the rationale chosen to support application of the rule.⁹⁵

An early indication of the type of police conduct which falls within the good faith exception was presented in Justice Powell's concurrence in *Brown v. Illinois*.⁹⁶ Powell discussed good faith in terms of a sliding scale, with flagrantly abusive violations of the fourth amendment at one extreme and technical violations at the other.⁹⁷ Technical violations included good faith reliance on either a warrant later invalidated or a statute subsequently held unconstitutional.⁹⁸ Examples of fourth amendment violations considered to be flagrantly abusive included pretextual conduct or unnecessarily intrusive invasions of personal privacy.⁹⁹ In cases involving technical

92. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Calandra*, 414 U.S. 338 (1974).

93. 422 U.S. at 538. The Court examined good faith in *Peltier*, but the decision was based on retroactivity grounds.

94. 422 U.S. at 539.

95. The Court reiterated its concern that evidence not be excluded in all cases of unlawful behavior by law enforcement personnel by indicating that the state of mind of the officer is important:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. at 542.

96. 422 U.S. 590, 606-16 (1975)(Powell, J., concurring in part). In *Brown*, the defendant was arrested illegally and given full *Miranda* warnings. After the warnings, the defendant made two inculpatory statements. On appeal from a decision of the trial court, the Illinois Supreme Court had adopted a *per se* rule whereby the giving of *Miranda* warnings broke the causal link between an illegal arrest and statements made after the warnings. Therefore, the Illinois court held admissible statements made following an illegal arrest, but only if made after *Miranda* warnings. The Supreme Court reversed, holding that while the warnings may have cured the fifth amendment problem, they did not purge the confession of the taint of illegal arrest in violation of the fourth amendment. The confession was not found to be a sufficient product of free will even after the warnings were given. The state failed to shoulder its burden of proving them admissible under *Wong Sun*. *Id.*

97. *Id.* at 610.

98. *Id.* at 611.

99. *Id.*

violations, neither deterrence nor judicial integrity was served by the exclusion of evidence.¹⁰⁰ However, in cases of flagrant violations, according to Powell, both rationales demand exclusion of evidence.¹⁰¹

Although good faith has been explicitly a factor in recent decisions, no court has held good faith reliance on a warrant or good faith belief in the constitutionality of conduct to be an exception to the exclusionary rule. Doctrinal development of the good faith exception for police conduct finds its strongest support in *Stone v. Powell*. The issue of good faith was raised by the petitioner, the State of California, in *Stone* but was not a basis for the Court's decision.¹⁰² However, the issue of good faith was addressed in both Chief Justice Burger's concurring opinion and in Justice White's dissent. Burger's concurring opinion argued that there is little reason for applying the exclusionary rule to evidence seized in good faith;¹⁰³ no deterrent purpose is served by such an application.¹⁰⁴ The Chief Justice suggested abolishing the rule altogether or applying it only to egregious bad faith conduct,¹⁰⁵ since the cost to the criminal justice system of excluding highly probative evidence is far too high.¹⁰⁶

Justice White's dissenting opinion offered a more comprehensive discussion of good faith. In addition to examining technical violation, such as good faith reliance on a statute,¹⁰⁷ White discussed good faith mistakes: *e.g.*, officers acting on a good faith belief about the existence of probable cause.¹⁰⁸ In either situation, White argued, excluding evidence cannot affect an officer's future conduct.¹⁰⁹ Hence, deterrence is not achieved, and the only consequence of suppression is exclusion of probative evidence from trial.¹¹⁰

Justice White's approach to the good faith exception is unique because he links the exclusionary rule to the good faith defense in section 1983 actions.¹¹¹ Relying on such section 1983 cases as *Pierson v.*

100. *Id.* at 612.

101. *Id.* at 611. "In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruits of official misconduct be denied." *Id.* (citations omitted).

102. The Court's decision rested on grounds of federal habeas corpus review and not on any specific exclusionary rule issue. 428 U.S. at 481-82.

103. *Id.* at 501-02 (quoting Justice White's dissent, 428 U.S. at 538).

104. 428 U.S. at 499 (Burger, C.J., concurring).

105. *Id.* at 501.

106. *Id.* at 500. Although Burger mentioned good faith in his concurring opinion, his opinion was basically an attack on the exclusionary rule as a "Draconian, discredited device in its present absolutist form." *Id.*

107. *Id.* at 539.

108. *Id.* at 538-39.

109. *Id.* at 540.

110. *Id.*

111. See text and accompanying notes 229-277 *infra*.

*Ray*¹¹² and *Scheuer v. Rhodes*,¹¹³ White can find no reason for allowing a good faith immunity in section 1983 while not allowing a good faith exception in exclusionary rule cases:

If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf. He is not at all recompensed for the invasion by merely getting his property back. It is often contraband and stolen property to which he is not entitled in any event. He has been charged with crime and is seeking to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied. I would modify it accordingly.¹¹⁴

Interestingly, under White's articulation of the good faith exception two requirements must be met: first, the officer must believe in good faith that the conduct was constitutional,¹¹⁵ and second, there must be reasonable grounds for that belief.¹¹⁶ Although the good faith exception to the exclusionary rule was, therefore, clearly articulated in *Stone*, it was not explicitly accepted by a majority of the Court.¹¹⁷

112. 386 U.S. 547 (1967).

113. 416 U.S. 232 (1974).

114. 428 U.S. at 541-42. As one commentator has pointed out, Justice White's reference to the section 1983 good faith defense was not fortuitous, see Comment, *supra* note 43, at 924. Although *Stone v. Powell* was decided on the narrow grounds of federal habeas corpus review, the brief for the petitioner, State of California, argued that since the arrest of Powell was made in good faith reliance on a presumptively valid statute, its subsequent invalidation does not compel application of the exclusionary rule. See Brief of Petitioner at 29. The basis for the State of California's argument was a Fifth Circuit decision, *United States v. Kilgen*, 445 F.2d 287 (1971). In *Kilgen*, a confession was held to be admissible, even though the arrest pursuant to a then valid vagrancy statute was later found unlawful because the vagrancy statute was unconstitutional. The reasoning of Judge Morgan in *Kilgen* was clear: "overturning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute." 445 F.2d at 289. Judge Morgan relied on *Pierson v. Ray*, 386 U.S. 547 (1967), as authority for the concept of a good faith exception to the exclusionary rule. *Pierson* is a section 1983 case involving the suit of a police officer for the deprivation of the criminal defendant's rights. Cases in accord with *Kilgen* include, *Wiley v. Dagget*, 551 F.2d 776 (8th Cir. 1977); *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976).

115. 428 U.S. at 538.

116. *Id.* This two-part subjective-objective test articulated by Justice White is substantially similar, if not the same, as that articulated by the Second Circuit in *Bivens v. Six Unknown Named Agents (Bivens II)*, 456 F.2d 1339 (2d Cir. 1972). For a complete discussion of the *Bivens II* test, see text accompanying notes 238-245 *infra*.

117. Justice Blackmun's opinion in *United States v. Janis*, 428 U.S. 433 (1976), also supports the good faith exception to the exclusionary rule. As Blackmun phrased it, the issue in *Janis* was whether "evidence obtained by a state criminal law enforce-

With *Michigan v. DeFillippo*,¹¹⁸ Justice White's call for a good faith exception to the exclusionary rule similar to the good faith defense available to defendants in section 1983 actions¹¹⁹ mustered majority support.¹²⁰ In *DeFillippo*, a Detroit ordinance allowed a police officer to stop and question an individual when the officer had reasonable grounds to believe the person's behavior was cause for further investigation. The ordinance made it unlawful for any person who was stopped to refuse to identify himself.¹²¹ DeFillippo was stopped for suspicious behavior and upon the officer's request refused to identify himself. He was then arrested and searched. The search revealed a controlled substance, and DeFillippo was charged with unlawful possession. The Michigan Court of Appeals held the statute unconstitutionally vague and concluded that any evidence obtained pursuant to an unlawful arrest was inadmissible. The Supreme Court granted certiorari.¹²² The Court reversed, holding the arrest valid based on the officer's good faith belief that probable cause existed under the ordinance.¹²³ That the ordinance was subsequently found invalid was of no consequence. Chief Justice Burger, writing for the Court, said that arresting officers should not be charged with dereliction of duty when they believed they had probable cause under an unchallenged statute.¹²⁴

Although the Court's decision ultimately rested on a finding that the arrest was valid,¹²⁵ the Court's approach substantially tracks the reasoning of Justice White in *Stone*.¹²⁶ First, the Court found the

ment officer in good faith reliance on a warrant that later proved to be defective [should] be inadmissible in a federal civil tax proceeding." *Id.* at 447. In concluding that the evidence was admissible, Justice Blackmun relied on the officer's good faith belief in the legality of the search to lend support to his conclusion that no deterrent purpose would be served by extending the exclusionary rule to federal civil proceedings. *Id.* at 454.

118. 443 U.S. 31 (1979).

119. See text accompanying notes 229-277 *infra*.

120. Chief Justice Burger wrote the opinion in which Justices Stewart, White, Blackmun, and Rehnquist joined. Justice Blackmun also filed a concurring opinion.

121. 443 U.S. at 39.

122. *Id.* at 34-35. The Michigan Supreme Court had refused to grant leave for appeal. Because the holding of the Michigan appellate court was contrary to the Fifth Circuit's decisions, such as *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971), which held such arrests valid, the Court granted certiorari.

123. 443 U.S. at 39.

124. *Id.* at 35. The Chief Justice relied on the 1983 case of *Pierson v. Ray* for support that an officer acting in good faith should not be charged for the consequences of his actions.

125. *Id.* at 38.

126. It can be persuasively argued that *Michigan v. DeFillippo* is in reality an exclusionary rule case in disguise rather than a substantive analysis of the applicability of the fourth amendment's requirement of probable cause. See Note, *The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine*, 55 WASH. L. REV. 849 (1980).

Detroit police officer believed in good faith that there was probable cause,¹²⁷ and second, the Court found there were reasonable grounds for such belief under the then unchallenged ordinance.¹²⁸ And finally, there is no reason to exclude evidence obtained in good faith under a presumptively valid ordinance since no deterrent purpose will be served.¹²⁹

The emergence of a good faith exception as a limitation on the application of the exclusionary rule is thus detectible in the Court's recent decisions.¹³⁰ Early use of the good faith exception was limited to cases where a police officer relied on a presumptively valid statute, but the exception will presumably be extended to other situations. Good faith reliance on a presumptively valid warrant or pursuant to an exception to the warrant requirement would also fall within the ambit of the Court's reasoning. *Michigan v. DeFillippo* portends this development. Though *DeFillippo* involved an officer who believed he had probable cause because of a presumptively valid city ordinance, nothing in the Court's opinion indicates that the presence of a statute is essential to the Court's reasoning. Good faith belief that probable cause existed under the case law should suffice.

A recent Fifth Circuit case developed further the good faith exception to the exclusionary rule. In *United States v. Williams*,¹³¹ the twenty-four member en banc panel held that evidence seized by a federal officer in a search incidental to arrest was admissible under either of two independent and distinct dispositions. In Part I of the decision, a majority of the panel held that the arrest was legal and

127. 433 U.S. at 40.

128. *Id.*

129. *Id.* at 38 n.3.

130. A recent Supreme Court opinion which referred to police officer good faith as an exception to *per se* exclusion of evidence is *Rawlings v. Kentucky*, 100 S. Ct. 2556 (1980). In *Rawlings*, an issue was whether an admission by the defendant should be suppressed as the fruit of an illegal detention. In holding that the statement was admissible, the Court applied a five part test first enunciated in *Brown v. Illinois*, 422 U.S. 590 (1975). Under that test, the Court first inquired as to whether *Rawlings* had received his *Miranda* warnings. A second determinant was the "temporal proximity of the arrest and the confession." 100 S. Ct. at 2563 (quoting *Brown*, 422 U.S. at 603). Third, any circumstances which might have intervened between the initial detention and the challenged admission are relevant. Fourth, the Court said, "*Brown* mandates consideration of the 'purpose and flagrancy of the official misconduct.'" 100 S. Ct. at 2564 (quoting *Brown*, 422 U.S. at 603-04). As part of this consideration the Court inquired into whether the officer engaged in conscious and flagrant misconduct necessitating exclusion of the evidence. Implicit in this consideration is the Court's recognition that good faith conduct by police does not mandate *per se* application of the exclusionary rule. The final determining factor was whether the statements were made voluntarily.

131. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3531 (U.S. Jan. 27, 1981)(No. 80-5613).

that therefore the incidental search and seizure were legal.¹³² A majority of the court in Part II of the decision also held that even if the arrest were illegal, the officer's reasonable good faith belief in the validity of the arrest dispensed with the need to apply the exclusionary rule because no deterrent purpose would be served.¹³³ The source of the good faith exception of Part II was various Supreme Court¹³⁴ decisions and writings of commentators.¹³⁵ Accordingly, the court stated in Part II of the opinion:

Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.¹³⁶

United States v. Williams illustrates that judges are beginning to read recent Supreme Court opinions concerning the exclusionary rule as impliedly supporting a good faith exception to the rule. Explicit recognition of the good faith exception by a court of appeals likely means that the Supreme Court will soon confront the issue directly¹³⁷ and that more cases will rely on the good faith exception and limit the availability of the exclusionary rule as a remedy for fourth amendment violations.

Cases like *Williams* may severely curtail the remedial functions of the exclusionary rule. If good faith conduct by police deprives individuals of constitutional rights but is nonetheless shielded from the reach of the rule, victims will be justly irate. A possible alternative remedy exists in 42 U.S.C. § 1983. Section 1983 provides a civil remedy to private parties deprived of constitutional rights by public officials acting "under color of" state law. A limitation on the remedial function of section 1983 actions has developed, however; police officers are accorded a qualified good faith immunity to actions brought under section 1983. The combined good faith exception to

132. *Id.* at 839.

133. *Id.* at 847.

134. In addition to cases discussed in this Comment, the court also cited *United States v. Caceres*, 440 U.S. 741 (1979)(evidence obtained in violation of IRS regulations); *Rakas v. Illinois*, 439 U.S. 128 (1978)(standing to assert fourth amendment rights); *United States v. Ceccolini*, 435 U.S. 268 (1978)(suppression of consensual testimony); and *Harris v. New York*, 401 U.S. 222 (1971)(admissibility of testimony taken in violation of *Miranda* for impeachment purposes).

135. Two commentators on whom the Court relies are Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); and Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

136. 622 F.2d at 846-47.

137. Although certiorari was denied in *Williams*, recognition of the good faith exception by a majority of the Fifth Circuit increases the probability that an exclusionary rule case decided solely on good faith will reach the Supreme Court.

the exclusionary rule and defense to a section 1983 action result in many instances where an individual whose fourth amendment liberties have been violated will be left without a remedy. The history of 42 U.S.C. § 1983 and the evolution of the doctrine of qualified good faith immunity show the similarity of developments in exclusionary rule law and in civil rights damages actions.

III. THE HISTORY OF SECTION 1983 AND THE DEVELOPMENT OF QUALIFIED "GOOD FAITH" IMMUNITY.

A. *The Historical Background of 42 U.S.C. § 1983.*

Soon after the outbreak of the Civil War, Congress greatly expanded the subject-matter jurisdiction of the federal courts.¹³⁸ Acting "primarily out of concern for the war effort and the interests of the freedmen, . . . [Congress'] expansion of federal court jurisdiction . . . reflected an awareness of the need for national regulation of an increasingly national economy."¹³⁹ During the war years and immediately thereafter, the removal jurisdiction of the federal courts was significantly expanded;¹⁴⁰ the habeas corpus powers of the federal courts were increased;¹⁴¹ and each of the major civil rights acts of that era provided individual access to the federal courts.¹⁴² Congress' expansion of federal courts' jurisdiction reflected a belief that the judiciary was the institution best qualified to protect civil rights.¹⁴³ The post-war years also witnessed enlargement of federal judicial power vis-a-vis that of the states through the adoption of the thirteenth, fourteenth, and fifteenth amendments to the Constitution.¹⁴⁴

138. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 61-65 (1927); S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 143-60 (1968).

139. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1138, 1147 n.68 (1977) [hereinafter cited as *Developments*]. See also F. FRANKFURTER & J. LANDIS, *supra* note 138, at 61-64.

140. See generally Act of March 3, 1863, ch. 81, § 5, 12 Stat. 756; Act of May 11, 1866, ch. 184, § 67, 14 Stat. 171; Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171; Act of Feb. 5, 1867, ch. 31, 14 Stat. 27.

141. The Act of Feb. 5, 1867, ch. 27, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3)(1976)) — commonly referred to as the Habeas Corpus Act of 1867 — greatly expanded federal judicial authority. See generally *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

142. See, e.g., Act of April 9, 1866, ch. 31, 14 Stat. 27 (the Civil Rights Act of 1866); Act of May 31, 1870, ch. 114, 16 Stat. 140 (the Enforcement Act); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (amendments to the Enforcement Act); Act of April 20, 1871, ch. 22, 17 Stat. 13 (the Civil Rights Act of 1871 — currently codified in part at 42 U.S.C. § 1983 (Supp. III 1979)); and the Act of March 1, 1876, ch. 114, 18 Stat. 335 (the Civil Rights Act of 1876).

143. See *Developments*, *supra* note 139, at 1147-50.

144. Part of the impetus for the fourteenth amendment was to protect the Civil Rights Act of 1866 from constitutional infirmity. Some Congressmen were concerned

Against this background of expanding federal authority, Congress passed the Civil Rights Act of 1871.¹⁴⁵ The first section of that act contained language eventually codified as 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹⁴⁶

that a future Congress, presumably one controlled by the Democratic party, would repeal the 1866 Act. To avoid that possibility these Congressmen sought to elevate the doctrine of the 1866 Act to constitutional stature by supporting the enactment of the fourteenth amendment. Congressman Garfield stated:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party [the Democratic] comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see the first section [of the fourteenth amendment] here.

CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

145. The Civil Rights Act of 1871 is also referred to as the Ku Klux Klan Act.

146. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (Supp. III 1979)). The first section of the Act, which evolved into the current version of section 1983, did not include the words "and laws" as originally passed in 1871. This language was added three years later by three distinguished jurists who had been commissioned by President Andrew Johnson "to simplify, organize, and consolidate all federal statutes of a general and permanent nature." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1978). The revision commission's codification of federal statutes is referred to as the Revised Statutes of 1874; section 1979 of the Revised Statutes is substantially similar to 42 U.S.C. § 1983 (Supp. III 1979). President Johnson had ordered the statutory revision pursuant to a congressional directive. *See* Act of June 27, 1866, ch. 140, 14 Stat. 74.

Until the Supreme Court's recent decision in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), some justices had argued strongly that the additional language added nothing to the original meaning of the statute. It was argued that section 1983 was designed to provide a private remedy for constitutional violations only; violations of rights arising under federal statutes "under color of" state law were said to be beyond the ambit of section 1983. *See, e.g., Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 623-76 (1978) (Powell, J., concurring).

In *Thiboutot*, however, the Court held that section 1983 encompasses claims based on violations of rights arising under federal statutes "under color of" state law. In *Thiboutot*, the plaintiffs challenged the state's calculations of benefits under 42 U.S.C. § 602(a)(7) (1976), and claimed relief under section 1983 for themselves and others similarly situated. The *Thiboutot* plaintiffs were not asserting a claim under

The Civil Rights Act of 1871 was enacted in response to continued Southern resistance to Reconstruction and, in particular, to stop Ku Klux Klan terrorism against blacks and union sympathizers.¹⁴⁷ To remedy what it considered a near state of anarchy in the Southern states¹⁴⁸ — a condition exacerbated by the inaction of Southern state and municipal governments¹⁴⁹ — Congress passed the Civil Rights Act of 1871. The Act contained provisions greatly expanding the scope of federal authority over the states,¹⁵⁰ by enlarging federal jurisdiction over offenses traditionally considered "local."¹⁵¹ Although the language of the 1871 Act is broad, Congress plainly did not act solely out of a desire to reduce the authority of the individual states;¹⁵² the Act must be read against the social conditions which compelled its enactment.¹⁵³

Shortly after the 1871 Act was passed, however, the Supreme Court severely restricted its applicability and returned primary authority over civil liberties to the states. In the *Slaughterhouse Cases*,¹⁵⁴ the Court held that the rights of Louisiana butchers under the privileges and immunities and due process clauses of the fourteenth amendment were not violated by a state-chartered slaugh-

section 1983 for any state-authored violation of a federally-protected constitutional right. Thus, the Supreme Court's interpretation of the words "and laws" creates a section 1983 "cause of action for deprivations under color of state law of any federal statutory right." *Maine v. Thiboutot*, 100 S. Ct. 2502, 2507 (1980)(Powell, J., dissenting).

The language in section 1983 relating to the District of Columbia was passed by Congress in response to the Supreme Court's decision in *District of Columbia v. Carter*, 409 U.S. 418 (1972), where the Court held that the District of Columbia was not a "state or territory" within the meaning of section 1983. *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284. *See also* H.R. REP. NO. 96-548, 96th Cong., 1st Sess. 4, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 2609-12.

147. *See* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-80 (1965); *See generally* D. CHALMERS, *HOODED AMERICANISM: THE FIRST CENTURY OF THE KU KLUX KLAN* (1965); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, 200 (1965).

148. Prior to 1871 the Reconstruction policies of the federal government were primarily concerned with affirmative state actions against blacks and union sympathizers. The failure of state and local governments in the South to control the activities of the Klan, however, led Congress in the 1871 Act to provide protection against official inaction and toleration or private lawlessness. *See Developments, supra* note 139, at 1153. *See also* CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871).

149. *See generally* CONG. GLOBE, 42d Cong., 1st Sess. 150-61 (1871).

150. Congressman Rice, an ardent opponent of the Act of 1871, spoke of a "dangerous assertion of both the power and the duty of the Federal Government to intervene in the internal affairs . . . of the States and to suspend the exercise of their rightful authority." CONG. GLOBE, 42d Cong., 1st Sess. 416 (1871).

151. *See* Shapo, *supra* note 147, at 282.

152. *Id.* *See also* CONG. GLOBE, 42d Cong., 1st Sess. 697-98 (1871)(remarks of Senator Edmunds).

153. *See* Shapo, *supra* note 147, at 282.

154. 83 U.S. (16 Wall.) 36 (1873).

tering monopoly which deprived them of their livelihood.¹⁵⁵ Justice Miller's opinion — the first to construe the Reconstruction amendments¹⁵⁶ — limited the protections of the fourteenth amendment to rights associated with national government.¹⁵⁷ This limitation effectively eliminated almost all civil rights from federal judicial scrutiny.¹⁵⁸ Justice Miller reasoned that although the first sentence of the fourteenth amendment makes "All persons born or naturalized in the United States . . . citizens of the United States and of the States wherein they reside," the second sentence provides only for the protection of privileges and immunities of citizens of *the United States* from abridgment by the states. This distinction meant that citizens' rights to protection of life, liberty, and property — rights traditionally associated with the states — were unaffected by the passage of the fourteenth amendment and, hence, remained under the control of the states.¹⁵⁹ This narrow reading of the fourteenth amendment prevailed for some time, thus preventing civil rights plaintiffs from effectively using the Civil Rights Act of 1871 to redress injuries caused by the state.¹⁶⁰

Judicial construction of the civil damages remedy provided under the 1871 Act — still affected by Justice Miller's narrow interpretation of the fourteenth amendment — was scanty and limited to one category of factual situations until well into this century.¹⁶¹ Until 1939, the 1871 Act was used principally to vindicate the voting rights of blacks.¹⁶² Thus, in *Nixon v. Herndon*,¹⁶³ the Supreme Court

155. *Id.* at 66-82.

156. *Id.* at 67.

157. *Id.* at 78-80. The Court enumerated several "privileges and immunities" associated with the existence of national citizenship. *See id.* at 79-80.

158. *See Developments, supra* note 139, at 1157-58.

159. Justice Miller's interpretation of the fourteenth amendment was completely inconsistent with Congress' interpretation of that amendment. The primary reason for the enactment of the fourteenth amendment was to secure to blacks protection from state actions amounting to a denial of equal protection of law or a deprivation of life, liberty, or property without due process of law. Justice Miller's interpretation left blacks' rights exactly where they always had been — within the control of the state. Justice Field observed in his dissent that the majority interpretation made the privileges and immunities clause "a vain and idle enactment," one which "accomplished nothing." *See Graham, Our "Declaratory" Fourteenth Amendment*, 7 *STAN. L. REV.* 3, 25 (1954).

160. *See, e.g., United States v. Cruikshank*, 92 U.S. 542 (1875). In *Cruikshank*, the Supreme Court held that the right to assemble to petition for a redress of grievances was not a privilege or immunity associated with national citizenship and hence, was outside of the protections of the fourteenth amendment unless the petition were directed to the federal government.

161. Between 1871 and 1920, only twenty-one cases were brought under section 1983. *See Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?* 26 *IND. L.J.* 361, 363 (1951).

162. *See, e.g., Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915).

unanimously reversed the dismissal of a damages action against Texas election officials who had denied blacks the right to vote in a Democratic primary pursuant to a state statute.¹⁶⁴ Justice Holmes found it "unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."¹⁶⁵ Holmes noted that the fourteenth amendment was enacted with a special intent to protect blacks from racial discrimination.¹⁶⁶ From 1939 to 1961, the Court laid a foundation for the application of section 1983 to cases not involving racial discrimination. In addition, it reinterpreted the words "under color of" so that conduct formerly beyond the scope of section 1983 was brought within its prohibitions.

*Hague v. CIO*¹⁶⁷ was the first section 1983 case not involving racial discrimination. In *Hague*, the Supreme Court affirmed a decision restraining city officials, acting under an ordinance,¹⁶⁸ from interfering with the plaintiffs' right to disseminate information about the National Labor Relations Act. The Court found the ordinance unconstitutional. Justice Roberts' majority opinion found that the right to discuss federal legislation was a privilege or immunity associated with national citizenship; hence, it was protected from state interference under the fourteenth amendment.¹⁶⁹

Following *Hague*, the Court turned its attention to the meaning of "under color of" state law — language used both in section 1983 and in 18 U.S.C. § 242, the criminal counterpart of section 1983.¹⁷⁰ In *United States v. Classic*,¹⁷¹ the Supreme Court reversed a judgment dismissing criminal charges brought under the predecessors¹⁷² of 18

163. 273 U.S. 536 (1927).

164. The statute in question contained the following language: "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." *Id.* at 540.

165. *Id.* at 540-41.

166. *Id.* at 541.

167. 307 U.S. 496 (1939).

168. For the language of the ordinance, see *id.* at 502 n.1.

169. *Id.* at 512-14.

170. 18 U.S.C. § 242 (1976) provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life. (Emphasis added).

For the text of 42 U.S.C. § 1983 (Supp. III. 1979), see text accompanying note 146 *supra*.

171. 313 U.S. 299 (1941).

172. Sections 51 and 52 of Title 18, under which the defendants in *Classic* were

U.S.C. §§ 241 and 242. The government charged the defendant election officials with deliberately miscounting ballots in a primary — conduct plainly in violation of state law.¹⁷³ In construing the "under color of" language used in section 52, the Court rejected a premise, previously taken for granted, that the challenged conduct must have been undertaken pursuant to a state statute or ordinance. The Court reasoned that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."¹⁷⁴

Four years after the *Classic* decision, the Court implicitly affirmed its expansive interpretation of the words "under color of." In *Screws v. United States*,¹⁷⁵ under the predecessor of 18 U.S.C. § 242,¹⁷⁶ the Court reversed a conviction of a Georgia sheriff who beat a black prisoner to death. Justice Douglas took the occasion to consider the meaning of the words "under color of" as used in the criminal statute:

Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. *It is clear that under "color" of law means under "pretense" of law.*¹⁷⁷

With these developments section 1983 began to assume the stature Congress likely intended when making it part of the Civil Rights Act of 1871. Justice Miller's restrictive interpretation of the scope of the fourteenth amendment in the *Slaughterhouse Cases*¹⁷⁸ had prevented effective utilization of the 1871 Act.¹⁷⁹ It was an open question whether the expansive interpretation of the "under color of"

charged, were predecessors of the present sections 241 and 242 of Title 18, United States Code. The text of 18 U.S.C. § 241 (1976) is as follows:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

For the text of 18 U.S.C. § 242 (1976), see note 170 *supra*.

173. 313 U.S. at 308.

174. *Id.* at 326.

175. 325 U.S. 91 (1945).

176. See note 170 *supra*.

177. 325 U.S. at 111 (emphasis added).

178. 83 U.S. (16 Wall.) 36 (1873).

179. See text accompanying notes 154 - 161 *supra* and note 159 *supra*.

language developed under the criminal statute would also be applied to section 1983, however.¹⁸⁰ *Monroe v. Pape*¹⁸¹ answered that question and ushered in the modern era of civil rights litigation under section 1983.

B. *Monroe v. Pape and the Question of Immunity.*

In *Monroe v. Pape*,¹⁸² the Supreme Court held that because section 1983 does not contain a requirement that the defendants' conduct be willful, plaintiffs need not allege and prove that the defendant acted with "a specific intent to deprive a person of a federal right"¹⁸³ in order to obtain relief. In *Monroe*, the petitioner and his family had brought suit both against certain police officers and against the officers' employer, the City of Chicago. They alleged that through improper interrogation and detention the defendants had deprived them of their rights to due process and equal protection of law. Justice Douglas, writing for the majority, found that the officers' conduct violated the petitioners' constitutional right to be free of unreasonable searches and seizures¹⁸⁴ and rejected a contention similar to that advanced in *Screws*: that police conduct cannot

180. The *Classic* and *Screws* decisions made section 1983 increasingly available in novel civil rights litigation. Thus, as more plaintiffs' attorneys attempted to extend the *Classic* and *Screws* rationales to encompass a variety of civil actions, section 1983 became applicable to suits alleging police misconduct, *see, e.g.*, *Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958); *Coleman v. Johnston*, 247 F.2d 273 (7th Cir. 1957); *Geach v. Moynahan*, 207 F.2d 714 (7th Cir. 1953); *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949); *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947), and to suits alleging first amendment deprivations, *see, e.g.*, *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947); *Hannan v. City of Haverhill*, 120 F.2d 87 (1st Cir. 1941); *Stapleton v. Mitchell*, 60 F. Supp. 51 (D. Kan. 1945).

181. 365 U.S. 167 (1961), *overruled in part by*, *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

182. For early commentary *see* Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145 (1961).

183. 365 U.S. at 187 (quoting *Screws v. United States*, 325 U.S. 91, 103 (1945)). With the exception of *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), the pre-*Monroe* cases generally held that for liability to exist under section 1983 the defendant would have to have acted purposefully to deprive the plaintiff of a federal right. *See, e.g.*, *Cobb v. City of Malden*, 202 F.2d 701, 707 (1st Cir. 1953). The *Monroe* majority stated that one of the reasons for the adoption of section 1983 was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. at 180 (emphasis added). It has been noted that this language left the state of mind requirement of section 1983, if any, in doubt. *See* Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870, 875 (1973).

184. 365 U.S. at 171 (citing *Elkins v. United States*, 364 U.S. 206 (1960); *Wolf v. Colorado*, 338 U.S. 25 (1949)). The Court did not reach plaintiffs' equal protection claims.

be "under color of" state law if it violates state law.¹⁸⁵ The Court noted that "meaning given 'under color of' law in the [*Classic* and *Screws* cases] was the correct one"¹⁸⁶ and approved its extension beyond criminal cases. Noting that "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"¹⁸⁷ the Court held that the petitioner had stated a valid cause of action under section 1983.¹⁸⁸

Monroe v. Pape triggered a sharp increase in litigation under section 1983.¹⁸⁹ This barrage of civil rights litigation also prompted commentary urging limitations upon the section 1983 action.¹⁹⁰ However, despite some later limitations on the scope of section 1983,¹⁹¹ civil rights litigation under it promises to continue unabated.¹⁹²

The judicially-created doctrines of absolute and qualified immunity are the principal sources of limitations on the reach of section 1983. Consideration of the various absolute and qualified immunities shows that the development of the qualified "good faith" immunity in section 1983 jurisprudence resembles the development of the good faith exception in exclusionary rule cases.

Civil rights suits under section 1983 and other statutes have been brought against a panoply of governmental officials¹⁹³ — each entrusted with a degree of policy-making discretion. Under a literal

185. 365 U.S. at 185-86.

186. *Id.* at 187.

187. *Id.*

188. As to the City of Chicago, the Court affirmed the judgment of the court of appeals holding that a municipal corporation is not a "person" within the meaning of section 1983. *Id.* at 187-92.

189. In 1960 there were only two hundred and eighty suits filed in federal court under all of the civil rights acts. See [1960] AD. OFF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1961). In 1972, approximately eight thousand suits were filed under section 1983 alone. See McCormack, *Federalism and Section 1983*, 60 VA. L. REV. 1, 1 n.2 (1974). In 1977, the number of section 1983 suits filed had increased to twelve thousand. See [1977] AD. OFF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1978).

190. See, e.g., Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983*, *Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 6557; McCormick, *supra* note 189; Shapo, *supra* note 147; Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

191. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Younger v. Harris*, 401 U.S. 37 (1971).

192. See note 189 *supra*.

193. See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975)(school administrators); *Scheuer v. Rhodes*, 416 U.S. 232 (1974)(governors); *Mukmuk v. Commissioner of the Dep't of Correctional Servs.*, 529 F.2d 272 (2d Cir. 1976)(prison officials); *Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975)(police officers); *Halperin v. Kissinger*, 424 F. Supp. 838 (D.D.C. 1976)(the President of the United States).

interpretation of section 1983, every person who causes a deprivation of a citizen's rights, privileges, or immunities "under color of" state law is liable in damages or may be subjected to an injunction.¹⁹⁴ Despite the express language of the statute, section 1983 has never been read so broadly. The restrictions applicable to section 1983 suits have also been extended to civil rights suits against federal governmental officials. These suits against federal officers have been implied either under federal statutes¹⁹⁵ or under amendments to the United States Constitution.¹⁹⁶

In the last two decades, the attention of the federal courts has begun to focus on the substantive limits on liability and relief under section 1983. Virtually since its enactment, the remedy announced by section 1983 has been subject to limiting judicial constructions. The judiciary's most recent circumscription of the section 1983 remedies has come with the development of the doctrines of absolute and qualified immunity.

The Supreme Court's decision in *Pierson v. Ray*¹⁹⁷ in 1967 established that state court judges are absolutely immune from liability in section 1983 actions.¹⁹⁸ In reaching this conclusion, the Court relied on common law doctrine¹⁹⁹ allowing judges absolute immunity from liability in tort for conduct within the scope of their judicial function.²⁰⁰ The *Pierson* Court reasoned that subjecting judges to the possibility of civil liability for actions within their adjudicative function would erode principled and fearless decision-making.²⁰¹

The express language of section 1983 does not provide for absolute judicial immunity; plainly, incorporating the common law doctrine of absolute judicial immunity into section 1983 conflicts with the wording of the statute. The Court reasoned, however, that:

[w]e do not believe that this settled principle of law [absolute judicial immunity] was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Con-

194. See text accompanying note 146 *supra*.

195. See, e.g., *Halperin v. Kissinger*, 424 F. Supp. 838 (D.D.C. 1976) (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976)).

196. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implied right of action under the fourth amendment).

197. 386 U.S. 547 (1967).

198. *Id.* at 554.

199. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-57 (1871); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 537-39 (1868).

200. Among the reasons supporting the doctrine of absolute judicial immunity are: the need for an independent judiciary, preservation of judicial resources, fear that capable persons would be deterred from serving as judges if they might be subjected to retaliatory civil damage actions, and need for judicial finality.

201. 386 U.S. at 554.

gress meant to abolish wholesale all common-law immunities.²⁰²

Pierson also involved a section 1983 action against the police officers who had arrested the plaintiffs. In discussing possible immunity for policemen,²⁰³ the Court referred to the suggestion in *Monroe v. Pape*²⁰⁴ that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequence of his actions."²⁰⁵ The Court found that tort liability, in the case of police officers effecting an arrest, includes a defense of good faith and probable cause.²⁰⁶ The reason the defendant police officers in *Pierson* were permitted a defense of good faith and probable cause was because that defense was available at common law.²⁰⁷ The *Pierson* decision, then, established a channel through which many of the common law tort immunities could be imported into section 1983. *Pierson's* incorporation of a qualified immunity based on good faith parallels the good faith exception to the exclusionary rule in that both potentially remove remedies for fourth amendment violations.

The types of immunities made potentially applicable to section 1983 actions by *Pierson* have dramatically affected section 1983 litigation.²⁰⁸ Absolute and qualified immunity will be analyzed separately.

1. *The Concept of Absolute Immunity.* The doctrine of absolute immunity is applied upon a judicial determination that a defendant is not amenable to liability — under section 1983 or otherwise — for conduct within his official capacity. This immunity depends on the

202. *Id.* Justice Douglas in his dissent in *Pierson* noted that the legislative history did contain discussion of the consequences of passing the Civil Rights Act of 1871 on the doctrine of absolute judicial immunity: "By the first section, [containing section 1983] in certain cases, the judge of a State court, though acting under oath of office is made liable to suit in the Federal court and subject to damages for his decision against a suitor" *Id.* at 562 (citing CONG. GLOBE, 42d Cong., 1st Sess. 385 (1871)).

203. The police officers in *Pierson* were afforded a qualified immunity. The Court held that "the defense of good faith and probable cause . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." 386 U.S. at 557.

204. 365 U.S. 167 (1961).

205. 386 U.S. at 556 (citing *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

206. *Id.* at 556-57. See note 203 *supra*. However, at common law "an officer [was] liable for an arrest without a warrant under an unconstitutional statute." Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Non Action*, 77 U. PA. L. REV. 155, 170-71 (1928).

207. 386 U.S. at 557. Whether the immunities grafted onto section 1983 by *Pierson* were to apply *pari passu* to civil rights suits against federal officers was resolved in the affirmative by the Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978). See note 210 *infra*.

208. For an interesting critique of the application of common law principles to section 1983 see Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damages Actions*, 30 VAND. L. REV. 941, 948-52 (1977).

status of the defendant and as such is an adequate basis for a motion to dismiss.²⁰⁹ Until recently, a range of federal executive department officials had absolute immunity.²¹⁰ Other governmental officials, such as municipal court judges,²¹¹ justices of the peace,²¹² judges of appellate courts,²¹³ and legislators²¹⁴ still enjoy absolute immunity. Prosecutors²¹⁵ and some "quasi-judicial" officers²¹⁶ have also been granted absolute immunity. Ordinarily, absolute immunity is accorded to members of the state and federal judiciary and to members of Congress and state legislators.

A. *Members of the Judiciary.* The Supreme Court's decision in

209. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

210. See, e.g., *Howard v. Lyons*, 360 U.S. 593 (1959) (Commander of a naval shipyard); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) (Deputy Attorney General, chief of the Executive Office of the United States Marshalls, First Assistant to the Assistant Attorney General, Deputy United States Marshall); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961) (District Director and Collection Officer of the Internal Revenue Service); *Papagiahakis v. The Samos*, 186, F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (immigration officer).

These cases generally held that the defendant executive department officials were absolutely immune from liability for discretionary acts within the limits of their authority. This standard for the application of absolute immunity to federal executive officials derives from *Barr v. Matteo*, 360 U.S. 564 (1959). In *Barr*, the Court reasoned that heads of executive departments, acting within the scope of their authority, should not be subject to civil liability because the fear of incurring such liability would hinder the stable and effective administration of public affairs. The standard that developed from *Barr*, however, was recently modified. In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court reasoned that since state executive officials enjoy only a qualified immunity, see text accompanying notes 229-276 *infra*, "federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." *Id.* at 501 (emphasis in original). Thus, *Butz* established that federal executive officials are governed by the same qualified good faith immunity, see text accompanying note 276 *infra*, that governs state executive officials.

211. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967).

212. See, e.g., *Misissippi ex rel Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972); *Pennebaker v. Chamber*, 437 F.2d 66 (3d Cir. 1971).

213. See, e.g., *Larsen v. Gibson*, 267 F.2d 386 (9th Cir. 1959).

214. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367 (1951). Members of Congress are protected from suits arising from their official duties under the speech and debate clause of the federal Constitution. See U.S. CONST., art. I, § 6.

215. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976). *But see Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) (no absolute immunity for prosecutors when not engaged in conduct associated with the judicial process).

216. See, e.g., *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972); *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972) (dictum); *Allison v. California Adult Auth.*, 419 F.2d 822 (9th Cir. 1969). *But see Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973) (no absolute immunity for judicial clerks performing purely ministerial acts).

*Pierson v. Ray*²¹⁷ firmly established that members of the judiciary are absolutely immune from liability for acts within their judicial function. The *Pierson* Court reasoned that the effective administration of justice would be undermined if judges were made to fear lawsuits by disappointed litigants. In *Stump v. Sparkman*,²¹⁸ the Supreme Court again had an opportunity to test the doctrine of absolute judicial immunity. In *Stump*, an Indiana judge had issued an *ex parte* order that a fifteen-year-old child be sterilized; the child was not informed that she was going to be sterilized nor was a guardian *ad litem* appointed to her. On the strength of the policy considerations set forth in *Pierson v. Ray*,²¹⁹ the *Stump* Court held that the Indiana judge was absolutely immune from liability. In order to get the benefit of the doctrine of absolute judicial immunity, the judge has to have acted in his judicial capacity;²²⁰ a judge acting outside the scope of his judicial function is not absolutely immune from liability.²²¹

B. Legislators. Members of Congress and state legislators also enjoy absolute immunity from liability for acts within their legislative function. The Constitution itself provides that members of Congress are absolutely immune from liability for acts within their legislative function.²²² Although the Constitution does not contain analogous provisions for state legislators, in *Tenney v. Brandhove*,²²³ the Supreme Court extended absolute immunity to them for their discretionary acts.²²⁴ The Court concluded that legislative immunity was

217. 386 U.S. 547 (1967).

218. 435 U.S. 349 (1978).

219. 386 U.S. 547 (1967).

220. This principle is well-illustrated by *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980). In *Harris*, the Supreme Court affirmed a judgment for compensatory and punitive damages where a state court judge had maliciously acted in excess of jurisdiction to deny the plaintiff equal protection of the laws on the basis of his race.

221. The concept of absolute judicial immunity was recently addressed by the Supreme Court in *Dennis v. Sparks*, 101 S. Ct. 183 (1980). The *Dennis* Court held that though judges are absolutely immune from liability under section 1983, private parties who conspired with a judge to commit a constitutional tort may be held liable under section 1983. The *Dennis* decision has recently been perceptively analyzed and critiqued. See Mantegani, *The Demise of the Doctrine of Derivative Immunity*, 11 SUP. CT. RESEARCHER 49 (1981).

222. See U.S. CONST. art. I, § 6.

223. 341 U.S. 367 (1951).

224. Brandhove had circulated a petition in the California Legislature calling for an end to funding of the Senate Fact-Finding Committee on Un-American Activities—commonly referred to as the Tenney Committee. Brandhove was summoned to appear before the Committee but refused to testify. For this refusal to testify, Brandhove was prosecuted in the state courts; eventually the contempt charges against him were dropped. Brandhove brought suit against the Committee members in their individual capacities alleging that they had deprived him of first amendment liberties, equal protection and privileges and immunities secured by the Constitution

an established principle in 1871 and declined to impute to Congress an intent to "impinge on a tradition so well grounded in history and reason by covert inclusion in the general language"²²⁵ of section 1983. The considerations that have supported according absolute immunity to members of the judiciary and to legislators have also supported the extension of absolute immunity to prosecutors.²²⁶ These considerations in civil rights litigation make possible the stabilization of the administration of justice and public affairs. There are no similar considerations supporting the exclusionary rule. In fact, the doctrine of absolute immunity in civil rights actions has no counterpart in the developing good faith exception to the exclusionary rule.

2. *The Concept of Qualified Immunity.* Unlike the absolute immunity afforded defendants on the basis of their status, "qualified immunity depends upon the circumstances and motivations of [the defendant] as established by the evidence at trial."²²⁷ The language of section 1983 can be read to impose strict liability on persons who "under color of" state law deprive citizens of their constitutional rights;²²⁸ on the face of the statute there is no reference to the state of mind of the actor. A *mens rea* requirement, however, has been grafted onto the statute by the judiciary and manifests itself most markedly in the "good faith" defense available to state and federal executive department officials.

A. *Executive Officials.* State and federal executive department officials are not accorded absolute immunity under section 1983, under the theory of constitutional tort or otherwise; their immunity is subject to certain qualifications. The discussion of the immunities accorded state and federal executive officials, therefore, will include an examination of the scope and elements of the qualified immunity doctrine. Through this discussion the theoretical similarity between qualified immunity and the good faith exception to the exclusionary rule can be better appreciated. An historical summary provides insight into the present law of qualified immunity.

Following *Monroe v. Pape*,²²⁹ the lower federal courts began to afford officials qualified immunity in the form of a good faith defense to damage actions under section 1983.²³⁰ The Supreme Court

without due process of law. *Id.* at 371.

225. *Id.* at 376.

226. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

227. *Id.* at 419 n.13.

228. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 560 (1967)(Douglas, J., dissenting); *Tenney v. Brandhove*, 341 U.S. 367, 381-83 (1951)(Douglas, J., dissenting); *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949); *Picking v. Pennsylvania R.R.*, 151 f.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947), *overruled by* *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966)(en banc).

229. 365 U.S. 167 (1961).

230. See, e.g., *Fidtler v. Rundle*, 497 F.2d 794 (3d Cir. 1974); *Smith v. Losee*, 485

first considered this development in *Pierson v. Ray*.²³¹ In *Pierson*, the defendant police officers were accorded the defense of good faith and probable cause²³² because "the background of tort liability" referred to in *Monroe v. Pape*²³³ included this defense. Under the *Pierson* standard, the police officers would be immune from liability for an admittedly unconstitutional arrest if they acted in good faith and with probable cause. Thus, the qualified immunity enjoyed by the police officers had both subjective and objective elements.²³⁴ Later language in *Pierson*, however, stressed the subjective element:

We agree that a police officer is not charged with predicting the future course of constitutional law . . . [if] the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.²³⁵

This language suggests that the qualified immunity enjoyed by the defendants was based more on subjective considerations than was the "good faith and probable cause" standard also announced in *Pierson*. Though later cases resolved this ambiguity, commentators still debate the true meaning of *Pierson*.²³⁶ Some courts interpreted the latter language to mean that a police officer is not entitled to a defense of good faith "when he makes an arrest without a warrant and without probable cause."²³⁷ This latter interpretation of *Pierson* bars raising the defense if the arrest was in fact unconstitutional and effected without probable cause, even though the officer acted in subjective good faith.

A more subjective standard of good faith was announced by the Second Circuit in *Bivens v. Six Unknown Named Agents*,²³⁸ (*Bivens II*). In *Bivens II*, federal narcotics agents entered the petitioner's apartment without a warrant and arrested him. While he was taken to headquarters, booked, and placed in confinement, the petitioner's

F.2d 334 (10th Cir. 1973)(en banc), cert. denied, 417 U.S. 908 (1974).

231. 386 U.S. 547 (1967).

232. *Id.* at 557.

233. 365 U.S. 167 (1961).

234. Chief Justice Warren stated that part of the common law "background of tort liability" referred to in *Monroe* included the false arrest defense of good faith and probable cause. See *Pierson v. Ray*, 386 U.S. 547, 556-57 (1963). The requirement of good faith is the subjective element of the common law defense. The probable cause requirement is the objective element.

235. 386 U.S. at 557.

236. See, e.g., Kattan, *supra* note 208, at 968-69 n.149; Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991, 1004-05 (1975).

237. *Joseph v. Rowlen*, 402 F.2d 367, 370 (7th Cir. 1968). See also *Anderson v. Haas*, 341 F.2d 497, 501 (3d Cir. 1965).

238. 456 F.2d 1339 (2d Cir. 1972). For a detailed consideration of this decision, see Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

apartment was thoroughly searched. Eventually the charges against him were dropped. After both the district court²³⁹ and the court of appeals²⁴⁰ dismissed his complaint for failure to state a claim under section 1983, the Supreme Court found that Bivens had a direct cause of action under the Constitution (*Bivens I*).²⁴¹ The Court remanded the case to the court of appeals to consider whether the officers should receive some form of immunity due to their official position.²⁴² In granting the federal agents a qualified immunity, the court of appeals in *Bivens II* considered three factors: the theoretical bases for the immunity of federal officers, case law under section 1983, and common law concerning the liability of police officers.²⁴³ It held that the federal agents had no absolute immunity because, if state and local police officers sued under section 1983 do not enjoy an absolute immunity, federal officers should not be so privileged.²⁴⁴ However, the agents were entitled to raise the defense that they acted "in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted."²⁴⁵

The qualified immunity accorded the federal agents in *Bivens II* parallels the developing good faith exception to the exclusionary rule. Where an arrest is in fact unconstitutional and real evidence of a crime is discovered as a result of that arrest, the good faith exception to the exclusionary rule would most probably operate to permit the evidence to be used at trial if the *Bivens II* standard could be met by the officers.

The qualified immunity accorded the federal agents in *Bivens II* is broader than that accorded the police officers in *Pierson*. Under the most commonly accepted view of the *Pierson* decision, the officers were granted the traditional common law defense of good faith and probable cause.²⁴⁶ Thus, under *Pierson* an officer could be held

239. 276 F. Supp. 12 (E.D.N.Y. 1967).

240. 409 F.2d 718 (2d Cir. 1969).

241. 403 U.S. 388 (1971). Because the officers who arrested Bivens and searched his apartment were federal agents they could not be held liable under section 1983 which applies only to deprivations of civil liberties or federal statutory rights "under color of" state law. The *Bivens I* Court, however, held that in the absence of a federal statutory remedy for unconstitutional searches, the Constitution itself provides a damages action against offending federal officers. Damages actions against state officials under section 1983 and damages actions against federal officials implied under the fourth amendment parallel each other to such an extent that absolute and qualified immunity have been applied equally to each.

242. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971).

243. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1341 (2d Cir. 1972).

244. *Id.* at 1342-47.

245. *Id.* at 1341.

246. See note 203 *supra*. Presumably, the *Pierson* standard requires that probable

liable even if he acted in good faith while effecting an arrest without probable cause.²⁴⁷ *Pierson* did not say that a reasonable good faith belief in the existence of probable cause constitutes a defense. The *Bivens II* court, on the other hand, "transformed a limited privilege to arrest . . . into blanket approval for all police activities where the officer reasonably and honestly regards himself in compliance with the law."²⁴⁸ The lower federal courts, for the most part, adopted the *Bivens II* standard thus extending protection to officers acting on something less than probable cause.²⁴⁹ *Bivens II*, therefore, is firm authority for the proposition that unconstitutional police actions do not necessarily give rise to civil liability.²⁵⁰

The Supreme Court next considered the doctrine of qualified immunity in civil rights actions in 1974 in *Scheuer v. Rhodes*.^{250.1} In *Scheuer*, the Court declared that "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability"²⁵¹ under section 1983. *Scheuer* was brought by the families of four college students killed at Kent State University by members of the Ohio National Guard.²⁵² The defendants included the Governor of Ohio, the Adjutant General, his assistant, the University president, and officers and enlisted men of the Ohio National Guard. The plaintiffs alleged that the defendants "'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the deaths of the plaintiffs' decedents."²⁵³ The district court dismissed the plaintiffs' suit on the ground that it was brought against the State of Ohio and, hence, was barred under the eleventh amendment.²⁵⁴ The court of appeals af-

cause be shown as that term has been articulated in the fourth amendment context. See, e.g., *Hampton v. City of Chicago*, 484 F.2d 602, 609 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

247. See note 206 and accompanying text *supra*.

248. Theis, *supra* note 236, at 1009.

249. See, e.g., *Burgwin v. Mattson*, 522 F.2d 1213 (9th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975); *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974); *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974); *Hill v. Rowland*, 474 F.2d 1374 (4th Cir. 1973); *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir.), *cert. denied*, 412 U.S. 953 (1973); *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973).

250. See *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1348-49 (1972) (Lombard, J., concurring).

250.1 416 U.S. 232 (1974).

251. *Id.* at 243.

252. For an account of this tragic episode in American history, see J. KELNER, *THE KENT STATE COVER UP* (1980). See also J. MICHENER, *KENT STATE: WHAT HAPPENED AND WHY* (1971).

253. 416 U.S. at 235.

254. *Id.* at 234. The eleventh amendment reads in pertinent part as follows: "[T]he judicial power of the United States shall not be construed to extend to any

firmed the dismissal on the alternate ground that the defendants enjoyed absolute immunity.²⁵⁵

The Supreme Court disposed of the eleventh amendment argument by noting that the suit was against the defendants in their individual capacities and not as representatives of the state.²⁵⁶ The Court then considered the issue of absolute immunity. After considering the original purposes of the doctrine of absolute immunity,²⁵⁷ the Court said:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.²⁵⁸

Under the *Scheuer* analysis, high executive officials of state governments must act in good faith with a reasonable belief in the constitutionality of their conduct in order to avoid liability under section 1983.²⁵⁹ Granting state executive officials this qualified immunity, the Court reasoned, balances the need to provide a remedy for the deprivation of civil liberties and the need to maintain the independence of a coordinate branch of government.²⁶⁰ Chief Justice Burger noted that "since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."²⁶¹ As more discretion is vested in an official, he will enjoy a broader immunity to liability under section 1983.²⁶² Whether the *Scheuer* qualified immunity standard is the same for purposes of the good faith exception to the exclusionary rule is an open question. As a practical matter, however, it is unlikely that administrative level police officers will be

suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State" See also *Hans v. Louisiana*, 134 U.S. 1 (1890).

255. *Scheuer v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), *rev'd*, 416 U.S. 232 (1974).

256. 416 U.S. at 237-38.

257. *Id.* at 239-40.

258. *Id.* at 247-48.

259. See text accompanying note 258 *supra*.

260. 416 U.S. at 247.

261. *Id.*

262. Though *Scheuer* was a suit under section 1983 its reasoning was soon extended to suits against federal officials for constitutional torts and for violations of federal statutes. See, e.g., *Rodriguez v. Ritchey*, 539 F.2d 394 (5th Cir. 1976); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975); *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974); *Burkhart v. Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975).

conducting unconstitutional searches and seizures resulting in the discovery of real evidence of a crime.

The *Scheuer* opinion also contained language indicating that the burden is on the plaintiff to prove lack of good faith in section 1983 litigation. Because the district court had accepted the Governor's claim that he acted in good faith, Chief Justice Burger found that the plaintiffs had "no opportunity . . . to contest the facts assumed in that conclusion."²⁶³ The Supreme Court has recently clarified the issue whether the plaintiff or defendant has the pleading burden with respect to "good faith." In *Gomez v. Toledo*,²⁶⁴ the Supreme Court unanimously reversed a First Circuit case which held that the "plaintiff in [a 1983] action must prove that the public officials acted in bad faith, meaning malice or recklessness."²⁶⁵ The Supreme Court stated that "[i]t is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful"²⁶⁶; the *Gomez* Court also stated that there is "no basis for imposing on the plaintiff an obligation to anticipate [a "good faith"] defense by stating in his complaint that the defendant acted in bad faith."²⁶⁷

Qualified immunity was next considered by the Supreme Court in *Wood v. Strickland*,²⁶⁸ a case involving the expulsion of two Arkansas high school students for "spiking" the punch at a school function. The plaintiffs had no hearing or opportunity to rebut the charges against them.²⁶⁹ The students sued the members of the school board and two school administrators under section 1983, alleging deprivations of procedural due process.²⁷⁰

The *Wood* Court held that the "correct" standard by which to evaluate the school board defendants' conduct includes both objective and subjective components:

The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.²⁷¹

263. 416 U.S. at 249-50.

264. 100 S. Ct. 1920 (1980).

265. *Gomez v. Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979), *rev'd*, 100 S. Ct. 1920 (1980).

266. *Gomez v. Toledo*, 100 S. Ct. 1920, 1924 (1980).

267. *Id.*

268. 420 U.S. 308 (1975).

269. It is now settled law that a student is entitled to the procedural due process guarantee of notice and opportunity to be heard prior to suspension from school for any length of time. See *Goss v. Lopez*, 419 U.S. 565 (1975).

270. Each of the defendants was sued in his individual capacity.

271. 420 U.S. at 321. The Court also stated that:

To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitu-

The *Wood* decision's development of the qualified immunity doctrine may prove significant in the evolution of the good faith exception to the exclusionary rule. Its impact may be that police officers will be charged with knowledge of the clearly established rights of arrestees. Thus, an illegal arrest effected in subjective good faith may result in the exclusion of real evidence of a crime discovered pursuant to that arrest. The *Wood* Court also considered the petitioners' claim that as school administrators they were entitled to an absolute immunity from liability under section 1983. Although acknowledging that school board members often function as adjudicators and legislators in the school disciplinary process,²⁷² the Court determined that these administrative officers' roles were more like those of executive officials and, hence, merited only a qualified immunity from liability under section 1983. The Court held that in the context of school discipline a school board member may be held liable in damage under section 1983 if he knew or should have known that the action he took within his sphere of authority would violate the constitutional rights of his charges.²⁷³ If the school board member acted maliciously to deprive a student of his constitutional rights or to cause any other injury to the student which in fact did result in a constitutional deprivation, then under the Court's standard, even if the official were ignorant of the valid right, he could be held liable under section 1983.²⁷⁴ Thus, under the *Wood* standard, public officials who are not accorded absolute immunity are charged with a modicum of legal knowledge.²⁷⁵ On the federal side, *Butz v. Economou*²⁷⁶ established that federal executive department officials are to be governed by the principles of qualified immunity that apply to state executive officials.

As developed by the *Scheuer* and *Wood* cases, the qualified immunity applies to all state executive officials and allows for a consideration of the scope of discretion vested in the defendant official;

tional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, *must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.*

Id. at 322 (emphasis added).

272. *Id.* at 319.

273. *Id.* at 322.

274. *Id.*

275. The reasoning of *Wood* has been extended to require that various officials be charged with knowledge of legal principles. *See, e.g.,* *Skehan v. Board v. Trustees*, 538 F.2d 53 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979 (1976) (college officials); *Jones v. Diamond*, 519 F.2d 688 (2d Cir. 1975) (local elected officials); *Knell v. Bensinger*, 522 F.2d 720 (7th Cir. 1975) (prison officials); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (college president); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975) (I.R.S. agents).

276. 438 U.S. 478 (1978); *see generally* Note, *Qualified Immunity for Executive Officials for Constitutional Violations*: *Butz v. Economou*, 20 B.C.L. Rev. 575 (1979).

the degree of knowledge of legal principles with which section 1983 defendants are charged is dependent on their official capacities. Thus, under *Scheuer*, an administrative level police officer may have a broader immunity than a patrolman because of his wider permissible range of discretion. At the same time, however, the administrative level police officer may be charged with a greater knowledge of the principles of constitutional rights than the patrolman under *Wood*. The *Scheuer* and *Wood* developments in the qualified immunity doctrine will certainly influence the development of the scope of the good faith exception to the exclusionary rule. To avoid liability under section 1983 a state official must act with a subjective good faith belief in the legality of his conduct and that belief must be reasonable in light of the knowledge of constitutional law with which the defendant is charged.²⁷⁷ Under the good faith exception to the exclusionary rule, to avoid the exclusion of illegally seized evidence an officer must meet the same standard.

IV. THE CONSEQUENCES OF "GOOD FAITH" AND A PROPOSAL

The essential premise of this Comment has been that for the guarantees of the fourth amendment to mean anything, effective remedies for their violation must be available. The proper remedial mix of damages and evidentiary exclusion is a question of social policy but the necessity of an adequate remedy is dictated by the Constitution. The emerging good faith exception to the exclusionary rule and the good faith immunities available under section 1983 and in *Bivens*-type actions are inconsistent with the constitutional requirement of an adequate remedy.²⁷⁸

By making the availability of remedies depend upon the state of mind of the person who has deprived a citizen of constitutional rights, the good faith exception and immunities will belittle constitutional guarantees. In the fourth amendment context, citizens will no longer be free of "unreasonable searches and seizures," only of "unreasonable searches and seizures where the actor is acting in bad faith." This diminution of rights clearly contradicts the Constitution.

The balance of this Comment will develop a proposal for a system

277. See text accompanying note 271 *supra*.

278. That the Supreme Court has not fully considered the ramifications of restricting the availability of a section 1983 action and the concomitant effect of such a restriction on the remedial alternatives available to an individual whose fourth amendment rights have been abridged is aptly illustrated by the recent decision of *Allen v. McCurry*, 101 S. Ct. 411 (1980). In *McCurry*, the Court held that an individual who has had a full and fair opportunity to litigate the constitutionality of a search or seizure in a state suppression hearing could be collaterally estopped to bring a section 1983 action in the federal court even though *Stone v. Powell* effectively closed the federal forum to habeas corpus petitioners whose fourth amendment claims had been heard in the state courts.

of remedies for fourth amendment infringements. Its goal is to provide an adequate remedy for constitutional violations while at the same time taking into account the high social cost of the exclusionary rule. Because the exclusionary rule is not constitutionally required and inflicts extraordinary social cost,²⁷⁹ it should be abolished.²⁸⁰ Abolition of the exclusionary rule could be balanced by strengthening the section 1983 and *Bivens*-type remedies.

A. *Strengthening the Section 1983 and Bivens-type Remedies in the Wake of the Abolition of the Exclusionary Rule.*

With the advent of *Monell v. Department of Social Services*,²⁸¹ in 1978 and *Owen v. City of Independence*,²⁸² in 1980, it is now possible to avoid the harsh consequences of the exclusionary rule and provide the victim of an illegal search and seizure an adequate remedy. In *Monell*, women employed by the City of New York sued the city, its Board of Education, and Department of Social Services under section 1983. They alleged that as a matter of official policy, the defendants required pregnant employees to take unpaid maternity leaves before medically necessary. The district court held that the policy was unconstitutional under *Cleveland Board of Education v. LaFleur*²⁸³ but denied relief in damages on the ground that municipalities are not "persons" within the meaning of section 1983.²⁸⁴ The court of appeals affirmed.²⁸⁵ The Supreme Court reversed and held that municipalities may be subject to liability under section 1983. To reach this result, the *Monell* Court overruled *Monroe v. Pape*²⁸⁶ insofar as it held that local governments were wholly immune from suit under section 1983.²⁸⁷ Although *Monell* established that municipalities could be sued under section 1983, it did not authorize unlimited municipal liability. The Court also concluded that municipalities cannot be subject to liability under section 1983 under a theory of *respondeat superior*.²⁸⁸

We conclude . . . that a local government may not be sued under § 1983 for an injury inflicted solely by the employees or agents. In-

279. See text accompanying notes 49-55 *supra*.

280. Much of the writing on the subject of the exclusionary rule has urged that the rule be abolished. See note 43 *supra*.

281. 436 U.S. 658 (1978).

282. 445 U.S. 622 (1980).

283. 414 U.S. 632 (1974).

284. The district court relied on *Monroe v. Pape*, 365 U.S. 167 (1961), for the proposition that municipalities are not "persons" within the meaning of section 1983. *Monell v. Dep't of Social Servs.*, 394 F. Supp. 853, 855 (S.D.N.Y. 1975).

285. *Monell v. Dep't of Social Servs.*, 532 F.2d 259 (1976), *rev'd*, 436 U.S. 658 (1978).

286. 365 U.S. 167 (1961).

287. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 663 (1978).

288. *Id.* at 691.

stead, it is when execution of a government's *policy or custom*, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.²⁸⁹

Thus, municipalities may be held liable under section 1983 only where their "policies" or "customs" inflict a constitutionally actionable injury. *Monell* did not decide whether municipalities were to be afforded the right to assert some form of qualified good faith immunity in section 1983 actions. However, in *Owen v. City of Independence*,²⁹⁰ the Supreme Court addressed this issue and held that a municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983.²⁹¹

In *Owen*, a chief of police sued the City of Independence and the city manager and city council in their official capacities, alleging that he was discharged from employment without notice of reasons and without a hearing, in violation of his constitutional rights to procedural and substantive due process.²⁹² The district court found against the petitioner²⁹³ on the strength of *Monroe v. Pape*,²⁹⁴ *Monell v. Department of Social Services*²⁹⁵ not having then been decided. The court of appeals affirmed—after *Monell*—on the ground that even though municipalities could be liable under section 1983, the officials were entitled to assert a good faith defense and had in fact acted in good faith and without malice.²⁹⁶ In reversing the court of appeals and holding that a municipality is not entitled to a qualified immunity from liability based on good faith, the *Owen* Court significantly increased the remedial power of section 1983.

Municipal liability without qualified good faith immunity offers a tantalizing source of protection for victims of fourth amendment violations. But a barrier exists in the Supreme Court's refusal to allow recovery against a local government under a theory of *respondeat superior*.²⁹⁷ The Supreme Court firmly established in *Monell* that the doctrine of *respondeat superior* could not be used against a municipality. By overruling *Monell* to the extent that it prohibits the use of the doctrine of *respondeat superior*, the Supreme Court could lay a foundation for a system of remedies for fourth amendment vio-

289. *Id.* at 694 (emphasis added).

290. 445 U.S. 622 (1980).

291. *Id.* at 641-44.

292. *Id.* at 629.

293. *Owen v. City of Independence*, 421 F. Supp. 1110 (W.D. Mo. 1976).

294. 365 U.S. 167 (1961), *overruled in part by Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

295. 436 U.S. 658 (1978).

296. *Owen v. City of Independence*, 589 F.2d 335, 338 (8th Cir. 1978).

297. Commentators have criticized the rule that restricts the use of *respondeat superior* against municipalities in civil rights suits. See, e.g., C. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS—CIVIL PRACTICE* § 257 (2d ed. 1980).

lations that is consistent with that constitutional guarantee.

B. Specific Proposals

This Comment's proposal for insuring the constitutional adequacy of remedies for fourth amendment violations contains several elements. Overruling *Monell* to the extent that it restricts the use of *respondeat superior* is a necessary prerequisite of the remedial system this Comment proposes.²⁹⁸

1. *Statutory Measures of Damages.* Compensatory²⁹⁹ and punitive³⁰⁰ damages are available to the successful section 1983 plaintiff. Most often, however, successful civil rights plaintiffs receive only modest jury awards.³⁰¹ One federal judge has noted that "the section 1983 plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict."³⁰² Consequently,

[w]hen jurors learn that a plaintiff has been in prison, as they frequently do when his credibility is attacked by prior convictions, it is not unusual for them to value a few days of his life at a figure as low as \$500. A few hours in jail has been priced at \$100.³⁰³

To remedy this, statutory measures of damages, in addition to compensatory damages for actual losses, should be made available to the successful section 1983 plaintiff. At least one federal district judge has recently advocated this approach.³⁰⁴ Although setting the amount of these liquidated sums is peculiarly a legislative judgment,

298. The necessity of having to overrule *Monell* to the extent that it prohibits the use of the theory of *respondeat superior* against a municipality could be avoided if the Supreme Court were to authorize an expansive interpretation of the words "custom or policy" as used in that case. If "custom or policy" could be understood to include conduct that would expose the municipality to liability to the same extent as if vicarious liability were available, then *Monell* could remain intact. Since such a result would be possible only if the plain meaning of "custom or policy" were severely strained, *Monell* would likely have to be overruled in order for this Comment's proposal to be effective.

299. See, e.g., *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975).

300. See, e.g., *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975).

301. See Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 465 (1978).

302. *Id.* at 454.

303. *Id.* at 465 (citations omitted). Judge Newman continued:

Inadequate awards defeat both the compensatory and deterrent objectives of a section 1983 damage suit. The lack of adequate compensation not only provides paltry monetary incentive to sue but also adds a final indignity to the denial of constitutional rights — the assessment by the judge or jury that the victim's rights were not worth much anyway. And low awards, whether borne by defendants or by their employers, obviously provide scant incentive to refrain from similar abuses in the future.

Id.

304. *Id.* at 464-65.

the figure should reflect the principle that the loss of a constitutional right should be compensated as a discrete element of damages. Moreover, it should reflect the seriousness of the loss. In light of these considerations — and particularly the shockingly low recoveries obtained by most successful section 1983 plaintiffs — the minimum amount for the deprivation of any constitutional right should be \$500. Wrongful incarceration for any length of time, however brief, should be compensated by at least \$2,500.

2. *A New Function for Good Faith.* Qualifying the availability of remedies by the state of mind of the person acting to deprive a citizen of his civil rights is inconsistent with the nature of constitutional rights.³⁰⁵ In the event that the stricture against the use of *respondeat superior* is overruled, the current good faith standard could be used to shift liability from the civil rights tortfeasor to his governmental employer.

Under this proposal, if an officer can prove by a preponderance that he acted in good faith,³⁰⁶ he should avoid personal liability for his constitutional torts. The governmental authority employing this well-intentioned tortfeasor would be liable to the plaintiff on a theory of *respondeat superior* and under *Owen* would itself be unable to assert a good faith defense. In this situation, with statutory damages available, the section 1983 plaintiff would be assured of a constitutionally adequate remedy. In addition, governmental authorities employing civil rights tortfeasors would have an incentive to attempt to limit future abuses.

As a corollary, if the officer's conduct is the result of bad faith, he should be held jointly and severally liable with his governmental employer. The possibility that the officer might be held liable in his individual capacity will have a strong deterrent effect. Furthermore, by also making the governmental authority responsible, the section 1983 plaintiff is not deprived of a source of compensation for his injuries. Left to look to the officer alone for compensation, the plaintiff might not be able to recover the full amount of his damages. By giving the governmental authority a right of contribution against its employee, the burden of collecting from the tortfeasor is shifted from the section 1983 plaintiff to the government. This approach is reasonable because the government authority placed the tortfeasor in a position to commit the tort in the first place.

V. CONCLUSION

The historical origins and evolution of the exclusionary rule and the action for damages under section 1983 reveal their fundamen-

305. See text accompanying notes 277-279 *supra*.

306. The good faith standard applied in this context should be that employed by the Supreme Court in *Wood v. Strickland*, 420 U.S. 308 (1974). See text accompanying note 271 *supra*.

tally different purposes and effectiveness as remedial devices for constitutional violations. The recent development of good faith exceptions to each has stripped the victim of what little redress he had and contradicts the language and spirit of both the Constitution and statute. In order to insure that victims of fourth amendment violations may be adequately compensated and that culpable conduct is punished, the exclusionary rule should be abolished and 1983 remedies expanded. The change would give content and vitality to constitutional civil rights that are now violated with impunity.

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